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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED MEXICAN STATES,

Petitioner,

v.

ERIN RAYNE OLSEN, A MINOR BY PATTY SHELDON, MATERNAL GRANDMOTHER AND GUARDIAN AD LITEM, AND URSULA BAINES SANCHEZ, BY AND THROUGH HER GUARDIANS AD LITEM JOSEPH J. CERNIE AND SALLY Z. CERNIE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether it would be consistent with international law as codified in the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976), codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (the "FSIA"), to exercise jurisdiction over the Government of the United Mexican States ("Mexico") based solely on its conduct in implementing the United States-Mexico Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7400, T.I.A.S. No. 8718 (the "Prisoner Exchange Treaty")?

(2) Whether the exercise of jurisdiction over Mexico under the circumstances of this case, which involves conduct centered primarily in Mexico and Mexican airspace and which Mexico submits does not involve conduct in the United States within the meaning of the FSIA, would be consistent with the non-commercial tort exception to sovereign immunity set forth in 28 U.S.C. § 1605(a)(5)?

(3) Whether the Ninth Circuit's ruling on the discretionary function exception in 28 U.S.C. § 1605(a)(5)(A), which expressly preserves the absolute immunity of foreign states from claims alleging abuse of discretion by a governmental official or employee, is consistent with this Court's recent decision in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 52 U.S.L.W. 4833 (U.S. June 19, 1984), as well as with the restrictive theory of sovereign immunity as embodied in 28 U.S.C. § 1605(a)(5)(A)?

(4) Whether Mexico could reasonably have expected that it might be required to respond in a court in the United States to claims based on the manner in which it performed its obligations under the Prisoner Exchange Treaty, and thus whether the exercise of jurisdiction over Mexico in this case would violate "due process"?

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OPINIONS BELOW

The initial opinion of the court of appeals, reported at 729 F.2d 641 (9th Cir. 1984), is reprinted in the Appendix hereto at A-1.[1] That opinion was withdrawn by the court of appeals and an amended opinion was filed, Nos. 83-5626 and 83-5629, slip op. (9th Cir. July 16, 1984) (the "Amended Opinion"), which is as yet unreported. The Amended Opinion is reprinted at

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1. References in the form "A-____" are to pages of the Appendix to this petition.

A-23. The unreported memorandum decision and order of the United States District Court for the Southern District of California, Civil No. 82-0413-JLI(M), is reprinted at A-39.

JURISDICTION

The initial opinion of the court of appeals was issued on March 30, 1984. (A-1.) The Amended Opinion was issued on July 16, 1984. (A-23.) On June 14, 1984, by order of this Court, the time for petitioner to file a petition for a writ of certiorari was extended to and including August 27, 1984. (A-47.) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The constitutional provision involved in this case is the Fifth Amendment to the United States Constitution, set out at A-48. The treaty involved is the United States-Mexico Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7400, T.I.A.S. No. 8718 (the "Prisoner Exchange Treaty"), set out at A-49. The statute involved is the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976), codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (the "FSIA"), set out at A-66.

STATEMENT OF THE CASE

In 1976, the United States of America and Mexico entered into the Prisoner Exchange Treaty for the exchange of prisoners of their respective nationalities. (A-49.) This case arises out of an attempted transfer of prisoners from Mexican prisons to United States authorities at Tijuana, Baja California, Mexico, pursuant to the Prisoner Exchange Treaty.

In 1979, Lotus Marie Sanchez, mother of the respondent Sanchez, and Julie Sheldon and Steven Olsen, parents of the respondent Olsen, were to be transferred to U.S. authorities under the Prisoner Exchange Treaty. Those persons had been convicted of drug smuggling offenses in Mexico. The Mexican and U.S. authorities agreed upon Tijuana as the place where penal jurisdiction over the prisoners would be transferred. U.S. law enforcement officials would then transport the prisoners across the border into the United States.

On October 26, 1979, the prisoners and their guards boarded an airplane owned and operated by the *Procuraduria General de la Republica* (Office of the Attorney General) of Mexico in Mérida, Yucatan to effectuate the transfer. The plane refueled at Monterrey, Nuevo León, and then flew on towards its destination, Tijuana. At Tijuana fog had substantially reduced visibility at the airport. The pilot made one attempt to land using a visual approach from the south, which was aborted. The pilot and Tijuana Air Control decided that an instrument landing system ("ILS") approach should be used. That approach required the plane to pass briefly over the United States because of the direction of the border in the vicinity of ILS runway 09, the runway which had to be used. Mexico and the United States had prepared for such an eventuality by entering into a Letter of Agreement, effective April 1, 1979 (the "Letter of Agreement"), which contemplates the assignment of zones of airspace to Tijuana Air Traffic Control in those instances when Mexican aircraft required the use of ILS runway 09, including such emergency circumstances as these.

The first attempt at an ILS landing was unsuccessful. While over Mexico the pilot decided to attempt again to land in Tijuana as scheduled and circled for a second ILS landing approach. On this second approach the plane struck a utility pole some 1,300 yards north of the border and crashed, killing all on board.

Respondents brought suit against Mexico in the United States District Court for the Southern District of California. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1330. The district court granted a motion by

Mexico to dismiss for lack of jurisdiction. (A-39.) On appeal, the Ninth Circuit reversed, holding that Mexico was not entitled to sovereign immunity by virtue of 28 U.S.C. § 1605(a)(5) and that Mexico was therefore subject to the jurisdiction of the district court. (A-1.) Although the court of appeals amended its opinion on July 16, 1984, its holding remained the same. (A-23.)

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Government of Mexico respectfully submits that this case involves important questions of international law, federal statutory law and constitutional law which require decision by this Court. At issue is whether Mexico may be held responsible in a court in the United States for its actions in implementing a treaty with the United States, by virtue of a provision of the FSIA which Mexico submits was never intended to reach such conduct.

The Government of Mexico has reiterated its position with respect to the international law issue, as well as its concern over the question of jurisdiction in this case, in a diplomatic note delivered to the State Department. *See* Diplomatic Note No. 0275 from the Embassy of Mexico to the United States Department of State, dated May 24, 1984. (A copy of the Mexican Diplomatic Note and a translation thereof are reprinted at A-78.)

Mexico undertook its obligations pursuant to the Prisoner Exchange Treaty in 1976 in the context of international law (as it then existed and, indeed, as it presently exists), under which a state cannot be subjected to the jurisdiction of the courts of another state in respect of the performance of its purely governmental functions. Mexico does not believe that Congress intended to abrogate this principle of international law when it enacted the FSIA, particularly where the conduct at issue involves implementation of a treaty concluded prior to the effective date of the FSIA. The Ninth Circuit's decision constitutes a substantial departure from what Mexico submits was a

previously existing consensus among nations on this point of international law sufficient to warrant this Court's attention.[2] (*See* pp. 6-11, *infra.*)

In addition to extending jurisdiction over foreign states to governmental conduct immune from local jurisdiction under international law, the Ninth Circuit's decision involves an application of 28 U.S.C. § 1605(a)(5) to alleged tortious conduct centered outside the United States, a result inconsistent with both international law and the legislative history of the FSIA. (*See* pp. 11-14, *infra.*) (A-9-10, 729 F.2d at 646-47.) (A-29-30, Amended Opinion at 7-10.)

The court of appeals' decision also involves an interpretation of the "discretionary function" exception to jurisdiction found in 28 U.S.C. § 1605(a)(5)(A) which contradicts this Court's decisions in *Dalehite v. United States*, 346 U.S. 15 (1953), and *United States v. S.A. Empresa de Vicao Aerea Rio Grandense (Varig Airlines)*, 52 U.S.L.W. 4833 (U.S. June 19, 1984) ("*Varig Airlines*"), rendered in the context of the Federal Tort Claims Act, 28 U.S.C. § 2680(a), (the "FTCA") as well as lower court decisions under the FSIA. (*See* pp. 15-18 *infra.*) (A-10-13, 729 F.2d at 647-48.) (A-30-33, Amended Opinion at 10-14.) Indeed, the Ninth Circuit's decision does not even refer to this Court's recent decision in *Varig Airlines*, but instead applies a mechanical test for determining the applicability of the discretionary function exemption which has been rejected in the context of the FTCA and is even less apt in the context of suits against foreign states.

Finally, the assertion of jurisdiction over Mexico in this case raises serious questions of constitutional law. Even if Congress had intended to provide for the assertion of jurisdiction under circumstances such as those present here (which Mexico submits is plainly not the case), reasonable notice of such a departure from previous practice and prevailing international law should have been given to all foreign states.

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2. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) (where this Court granted a petition for a writ of certiorari "because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area").

This Court has made clear that the element of foreseeability is critical to the constitutional issue, in that a party may not be subject to personal jurisdiction where the nature and quality of its contacts with the forum are not such that it may be held to a reasonable expectation of suit there. In this case, as is demonstrated in points I-III below, no such reasonable expectation of suit existed. In entering into the Prisoner Exchange Treaty, Mexico was entitled to rely upon the principle of sovereign immunity under international law to which the United States had adhered prior to the FSIA. Subsequently, Mexico could also be expected to rely upon Congress' announced purpose of codifying international law in the FSIA. Whatever may be the precise scope of the FSIA with respect to tort claims against foreign states, neither the statute itself nor its legislative history provides the notice necessary to overcome a foreign state's reasonable anticipation of immunity from suit in cases such as this case, which involves the performance by a foreign state of purely governmental functions in implementing a treaty with the United States. Thus, since Mexico could not reasonably have anticipated the possibility of being haled before the domestic courts of the United States, the assertion of jurisdiction over Mexico would constitute a violation of due process under the standards enunciated by this Court. (*See* pp. 18-21 *infra*.)

I.

MEXICO IS IMMUNE FROM DOMESTIC JURISDICTION UNDER INTERNATIONAL LAW IN RESPECT OF THE GOVERNMENTAL CONDUCT AT ISSUE

Under universally recognized principles of international law, sovereign states enjoy immunity from the jurisdiction of the domestic courts of other states. Traditionally, this immunity was absolute. *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). More recently, many states, including the United States, have adopted the so-called "restrictive theory" of sovereign immunity, permitting suits against foreign states when they engage in *commercial* or *private* transactions. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S.

682 (1976); Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984 (1952) (the "Tate Letter"). *See also* State Immunity Act, 1978, ch. 33 (U.K.), *reprinted in* 17 Int'l Legal Materials 1123 (1978); European Convention on State Immunity, May 16, 1976, Europ. T.S. No. 74, *reprinted in* 11 Int'l Legal Materials 470 (1972). Even under the "restrictive theory" of immunity, however, it has remained a universally accepted principle that states enjoy immunity "with regard to *sovereign* or *public acts*." Tate Letter at 984 (emphasis added). *See Asociacion de Reclamantes v. The United Mexican States*, No. 83-1596, slip op. (D.C. Cir. June 5, 1984); *Frankel v. Banco Nacional de Mexico, S.A.*, No. 82 Civ. 6457, slip op. (S.D.N.Y. May 31, 1983), *appeal dismissed*, No. 83-7543 (2d Cir. July 12, 1983); *Matter of Sedco, Inc.*, 543 F. Supp. 561, 564-65 (S.D. Tex. 1982); *Carey v. National Oil Corp.*, 453 F. Supp. 1097, 1102 (S.D.N.Y. 1978), *aff'd on other grounds*, 592 F.2d 673 (2d Cir. 1979); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 855-56 (S.D.N.Y. 1978). *See generally Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S. Ct. 1962, 1967-68 (1983).

In 1976, Congress enacted the FSIA, which became effective in January, 1977. In so doing, Congress sought to achieve uniformity in the application of the rules of sovereign immunity. Most importantly, however, Congress emphasized that the FSIA did not constitute a departure from accepted principles of international law. Rather, its stated primary purpose was to codify the restrictive theory of sovereign immunity, thus permitting suit against sovereign states when they engage in non-sovereign functions, while at the same time preserving their immunity when they act qua sovereign. *Verlinden*, 103 S. Ct. at 1968-69; *Asociacion de Reclamantes*, slip op. at 4-5; *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 817 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Jet Line Services, Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165, 1170 (D. Md. 1978). As expressly stated in the legislative history of the FSIA:

> First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

House Report (Judiciary Committee), H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6605 (the "House Report").

Moreover, the congressional "Findings and declaration of purpose" of the FSIA itself indicates Congress' view of the restrictive theory and reveals the basic principles underlying the statute:

> Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1602. It is against this background of international law and the FSIA's legislative history that the noncommercial tort exception to sovereign immunity contained in 28 U.S.C. § 1605(a)(5) must be viewed.[3]

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3. It is also in this light that, whatever the construction now placed on § 1605(a)(5) may be, Mexico's reasonable expectations should be assessed for purposes of the constitutional issue discussed in point IV. *See* pp. 18-21, *infra*.

The FSIA gives effect to the principle of immunity by affirmatively granting to foreign states immunity from the jurisdiction of U.S. courts, subject to certain exceptions. 28 U.S.C. § 1604. The codification of the "restrictive theory" of immunity was effected by providing for various exceptions to the immunity principle in 28 U.S.C. § 1605. Most non-sovereign activity falls under the rubric of "commercial activity" and is addressed by the immunity exception contained in 28 U.S.C. § 1605(a)(2), which provides that a foreign state may be subjected to suit in cases where the claim is based on a *commercial* activity of a foreign state having a specified nexus with the United States. However, apart from "commercial activity", there remains another form of activity which may properly be characterized as *private* or *non-sovereign* in nature and which thus falls outside the umbrella of the immunity principle under international law. For this reason, Congress enacted 28 U.S.C. § 1605(a)(5), known as the *noncommercial* tort exception to immunity, which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (5) not otherwise encompassed in paragraph (2) above [commercial activity of a foreign state], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

The legislative history of this provision makes clear that its main purpose was to deal with the problem of traffic accidents in the United States involving automobiles owned by foreign embassies. As stated in the House Report: "The purpose of Section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law." House Report, *supra* at 6620. *See Asociacion de Reclamantes*, slip op. at 15 ("The primary purpose of the 'tortious act or omission' exception of § 1605(a)(5) was to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country . . . . *We decline to convert this into a broad exception* for all alleged torts that bear some relationship to the United States." (emphasis added)); *Matter of Sedco, Inc.*, 543 F. Supp. at 567 ("The primary purpose of this exception is to cover the problem of traffic accidents by embassy and governmental officials in this country.").

While § 1605(a)(5) is drafted broadly in recognition of the difficulties inherent in formulating an all-inclusive enumeration of permissible tort actions, nowhere is there any support for the proposition that § 1605(a)(5) was intended to reach *sovereign* activity traditionally accorded immunity under international law. Such an interpretation would be flatly inconsistent with Congress' announced purpose of codifying international law and would place the United States in a unique position in the international community of states. As stated in *Frolova v. U.S.S.R.*, 558 F. Supp. 358, 362-63 (N.D. Ill. 1983), which involved the denial of an emigration permit by Soviet authorities:

> After reviewing the statute and its legislative history, however, it is this court's opinion that the FSIA was not designed to provide jurisdiction over a foreign sovereign in a case such as this. The Act specifically retained sovereign immunity for the foreign state's public acts. . . . Additionally, the tenor of the legislative history suggests that suits are to be allowed only for ordinary

claims, such as contract or tort claims arising from the foreign states activities in the United States.

See also Asociacion de Reclamantes, No. 83-1596, slip op. (D.C. Cir. June 5, 1984).

In the instant case, Mexico's conduct was purely governmental in nature; indeed, the Ninth Circuit's decision assumes the governmental nature of the conduct in question. (A-6, 729 F.2d at 645.)(A-27-28, Amended Opinion at 7.) Mexico was implementing a treaty concluded with the United States. The Prisoner Exchange Treaty itself deals with a totally noncommercial, nonprivate, governmental subject matter, namely, the exercise of penal jurisdiction over prisoners and the transfer of such jurisdiction by one state to another. Whatever may be the precise delimitation of 28 U.S.C. § 1605(a)(5), Mexico respectfully submits that this action certainly does not involve the kind of noncommercial tort which Congress intended to cover by enacting that provision.

II.

SECTION 1605(a)(5) IN ANY EVENT ONLY APPLIES TO TORTS TAKING PLACE IN THE UNITED STATES

Apart from the issues raised above concerning the substantive coverage of § 1605(a)(5), that provision was only designed to reach torts taking place in the United States. The legislative history unequivocally states: "[T]he tortious act or omission must occur within the jurisdiction of the United States." House Report, at 6619. The lower courts, including the Ninth Circuit, have generally recognized this territorial limitation on the scope of § 1605(a)(5). *Asociacion de Reclamantes v. The United Mexican States*, slip op. at 15 ("Even if the allegedly wrongful failure to compensate had the effect of retroactively rendering the prior acts on United States soil tortious, at the very least the entire tort would not have occurred here, . . . , and indeed we think its essential locus would remain in Mexico.") (citation omitted); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 840, 842 (D.C. Cir. 1984) ("Congress' principal concern was with torts committed in this country. . . . [B]oth

the tort and the injury must occur in the United States."); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) (The "practice is that a state loses its sovereign immunity for tortious acts only where they occur in the territory of the forum state."); *Matter of Sedco, Inc.*, 543 F. Supp. at 567 ("[t]he tort, in whole, must occur in the United States").

This interpretation of § 1605(a)(5) also conforms to international law which Congress intended to codify in the FSIA. *See McKeel*, 722 F.2d at 588; European Convention on State Immunity, *supra* at Art. 11 (no immunity "if the facts which occasioned the injury or damage occurred in the territory of the State of the forum"); U.K. State Immunity Act, 1978, *supra* at ch. 33, § 5 (no immunity for injury "caused by an act or omission in the United Kingdom"). Congress simply did not intend to extend the jurisdiction of U.S. courts over noncommercial tortious conduct of foreign states unless the tort occurred, in whole, in the territory of the United States. *See also Persinger*, 729 F.2d at 839-40.

In the instant case, the bulk of the conduct complained of took place either in the territory of Mexico or in Mexican airspace. The decision of the pilot to make a second ILS landing approach after he had missed the first approach was made in Mexico. All of the acts or omissions of the air traffic controllers at Tijuana Air Traffic Control must necessarily have occurred in Mexico. The training of the pilot and the maintenance of the plane all took place in Mexico. Moreover, although the Ninth Circuit based its decision on an allegation that some tortious act might also have taken place aboard the plane while the plane was momentarily in U.S. airspace, (A-8-10, 729 F.2d at 646-47) (A-28-30, Amended Opinion at 8-9), Mexico submits that none of the alleged tortious conduct took place in the territory of the United States within the meaning of § 1605(a)(5).

The United States is defined in the FSIA to include "all territory and waters, continental or insular, subject to the

jurisdiction of the United States." 28 U.S.C. § 1603(c).[4] It is true that the United States does assert sovereignty over the airspace above U.S. territory, but that position, which is extraneous to the FSIA, is not determinative of the intended scope of the FSIA when considering the issue presented here, *i.e.*, whether Congress intended to assert jurisdiction over foreign states in respect of alleged tortious acts which do not actually occur in U.S. territory.

In other contexts, the courts of appeals have rejected the notion that § 1605(a)(5) applies to tortious conduct occurring in areas over which the United States may be said to have jurisdiction, but which are nevertheless outside the territory of the United States as that term is commonly understood. Thus, for example, the courts have rejected the notion that tortious conduct in U.S. embassies overseas constitutes tortious conduct in the United States. As stated by the Ninth Circuit itself in *McKeel*, 722 F.2d at 587: "Although a literal reading of the statute supports this argument, we decline to accept it because we believe the intent of Congress was to the contrary." *See also Persinger*, 729 F.2d at 841 ("These consequences [of reading the FSIA to apply to all areas over which the United States has any jurisdiction] would entail not only serious inconvenience and injustice but also embarrassment to our foreign relations."). Similarly, applying § 1605(a)(5) in this case would be contrary to Congress' intent and may be disadvantageous to the foreign relations interests of the United States.

Apart from the technical questions raised by the location of the alleged tortious conduct, it is important to note that at all times up to the crash of the airplane, the prisoners remained under the exclusive penal jurisdiction of Mexico. The United States only receives jurisdiction over prisoners upon their physical transfer to U.S. authorities, which was to take place in

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4. Compare this definition with the definition of "United States" in the Federal Aviation Act of 1958, Pub. L. No. 85-426, 72 Stat. 731 (1958), which expressly provides that the term "United States" includes both the territorial waters and "the overlying airspace thereof." Codified as amended at 49 U.S.C. § 1301(41) (1978).

Tijuana in this case. *See* Prisoner Exchange Treaty, art. V(1). (A-54-55.) At all times up to the actual transfer, control over the treatment of the prisoners was exclusively in the hands of the Mexican authorities.[5] To interpret § 1605(a)(5) as overriding such Mexican authority would seriously undermine the purpose of the Prisoner Exchange Treaty and thrust U.S. courts into an area clearly unintended by Congress, *i.e.*, the review and adjudication of a foreign state's actions with respect to prisoners under its exclusive custody and control.

Moreover, even if an alleged tortious act occurring in U.S. airspace could otherwise form the basis of jurisdiction under § 1605(a)(5), the indisputable fact remains that the bulk of the alleged tortious conduct in this case took place either in Mexico or in Mexican airspace. Thus, the Ninth Circuit's decision would, if permitted to stand, result in an unworkable situation. The tortious conduct, if any, in U.S. airspace is inseparable from the conduct concededly occurring in Mexico and Mexican airspace. The latter conduct is clearly beyond the jurisdiction of U.S. courts under § 1605(a)(5) and therefore no judgment could be based thereon. To permit this case to go forward based solely on that portion of the alleged tortious conduct which occurred in U.S. airspace would thus result in the anomalous situation of adjudication of one small part of a chain of events the majority of which are beyond the jurisdiction of U.S. courts. This anomalous situation underscores the fact that the instant action, unlike ordinary tort actions involving traffic accidents and the like which by their nature occur entirely within the United States, is not one which Congress had in mind in enacting 28 U.S.C. § 1605(a)(5).

In sum, since none of the alleged tortious acts in this case took place in the territory of the United States, and since the bulk of the alleged tortious conduct indisputably occurred in Mexico and Mexican airspace, Mexico respectfully submits that it is not subject to jurisdiction under 28 U.S.C. § 1605(a)(5).

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5. Indeed, even after a transfer, the transferring state would retain certain aspects of jurisdiction over the offender. *See, e.g.*, Prisoner Exchange Treaty, art. VI. (A-56.)

III.

THE NINTH CIRCUIT'S DECISION ON THE DISCRETIONARY FUNCTION EXEMPTION IS INCONSISTENT WITH THIS COURT'S RECENT DECISION IN *VARIG AIRLINES*, AS WELL AS WITH THE RESTRICTIVE THEORY OF IMMUNITY AS EMBODIED IN 28 U.S.C. § 1605(a)(5)(A)

Section 1605(a)(5) contains a provision expressly preserving a foreign state's immunity from any tort claim based on an alleged abuse of discretion by an employee of the state. 28 U.S.C. § 1605(a)(5)(A). In determining the applicability of that provision, the Ninth Circuit applied the mechanical operational/planning test developed in the context of a similar provision of the FTCA, 28 U.S.C. § 2680(a). That test, however, has recently been repudiated by this Court in a decision under the FTCA and is particularly inappropriate in the context of suits against foreign states.

The legislative history of the FSIA, House Report, *supra* at 6620, indicates that a certain parallel may be drawn between the discretionary function exemption in 28 U.S.C. § 1605(a)(5)(A) and the provision of the FTCA preserving the absolute immunity of the United States from suits alleging abuse of discretion by government employees. 28 U.S.C. § 2680(a). In the seminal case on 28 U.S.C. § 2680(a), *Dalehite v. United States*, 346 U.S. 15 (1953), plaintiffs alleged that U.S. Government employees involved in supervising the production of fertilizer for shipment to European countries as foreign aid in the aftermath of World War II abused their discretion by: including an explosive compound in the fertilizer's formula; failing to conduct a reasonable investigation of safety factors; carelessly adopting standards as to bagging temperature, type of baggage and labeling of baggage used; choosing the wrong coating for individual fertilizer pellets; and failing to oversee properly the loading of the fertilizer. Thus, it was alleged that government officials had been negligent in the adoption and implementation of the fertilizer export aspect of

the post-World War II foreign aid program. Nevertheless, this Court held that the U.S. Government retained its absolute immunity from suit for such alleged abuse of discretion.

Since *Dalehite*, the federal courts have struggled in an effort to apply the principles therein established. Some circuits, including the Ninth Circuit, have adopted a test based upon whether the actions involved were carried out at the "planning" or "operational" level, permitting suit in the latter instance. *Thompson v. United States*, 592 F.2d 1104, 1111 (9th Cir. 1979). Others have rejected this approach as unworkable, preferring a functional approach focusing on the nature and quality of discretion involved. *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1593 (1984); *Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); *De Pass v. United States*, 479 F. Supp. 373 (D. Md. 1979).

Most recently, this Court has clarified the scope of the discretionary function exception under the FTCA in *Varig Airlines*. In particular, this Court, reversing two Ninth Circuit decisions, rejected the operational/planning test applied by the Ninth Circuit, stating: "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*, 52 U.S.L.W. at 4837. Yet, despite this Court's clear rejection of the very test applied by the Ninth Circuit in this case, (A-11-12, 729 F.2d at 648) (A-31, Amended Opinion at 11), the Ninth Circuit's decision does not even mention this Court's decision in *Varig Airlines*.[6]

Moreover, applying the discretionary function exception in the context of suits against foreign states necessarily involves additional considerations concerning the international law of

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6. *Varig Airlines* was decided after the original opinion of the Ninth Circuit in this case was filed. (A-1.) However, the Ninth Circuit withdrew that opinion and filed its Amended Opinion on July 16, 1984. (A-23.) The Amended Opinion changed parts of the original discussion of the Ninth Circuit on 28 U.S.C. § 1605(a)(5)(A), but left intact the operational/planning analysis which this Court rejected in *Varig Airlines*. (A-31, Amended Opinion at 11.)

foreign sovereign immunity and sensitive issues of foreign relations obviously not relevant under the FTCA. For example, in *Matter of Sedco, Inc.*, an action against a Mexican government agency alleging negligence by that agency in connection with a 1979 oil well blowout off the Mexican coast, the court exhibited a high degree of sensitivity to the issue of jurisdiction over the governmental conduct of a foreign state and held the discretionary function exemption in the FSIA applicable:

> Pemex, in this case, was executing a national plan formulated at the highest levels of the Mexican government by exploring for Mexico's natural resources. Any act performed by a subordinate of Pemex in furtherance of this exploration plan was still discretionary in nature and immune from suit under the FSIA. To deny immunity to a foreign state for the implementation of its domestic economic policies would be to completely abrogate the doctrine of foreign sovereign immunity by allowing an exception to swallow the grant of immunity preserved by § 1604.

543 F. Supp. at 567. *Cf. Rappenecker v. United States*, 509 F. Supp. 1024, 1027 (N.D. Cal. 1980) (In a suit alleging negligence in the undertaking and conduct of the Mayaguez rescue operation, the court stated: "[T]he discretionary function exception which immunizes that decision [to undertake the rescue operation] against judicial scrutiny extends also to acts of subordinates in carrying it out according to official directions."). *See also Goodwill Industries of El Paso v. United States*, 218 F.2d 270, 272 (5th Cir. 1954) ("The details or methods of carrying out" an international agreement constitute a discretionary act).

Had the Ninth Circuit in this case followed the principles set forth by this Court in *Varig Airlines*, the additional considerations inherent in an action against a foreign state would have been addressed and a different result would clearly have been reached. As this Court stated in *Varig Airlines*, the key question in determining the applicability of the discretionary function exemption in any case is whether the conduct involved is

of the nature and quality that Congress intended to shield from tort liability. 52 U.S.L.W. at 4837. When this analysis, rather than the inapt operational/planning test, is applied to this case, there is little doubt that the conduct of the Mexican government in implementing the Prisoner Exchange Treaty is within the scope of the discretionary function exemption of the FSIA. As demonstrated in point I above, such governmental conduct of a state has always been considered beyond the jurisdiction of the domestic courts of other states under international law, and Congress never intended to alter that basic principle in enacting the FSIA.

Thus, since the Ninth Circuit's decision on the discretionary function exemption contained in 28 U.S.C. § 1605(a)(5)(A) applied a test most recently rejected by this Court and particularly inappropriate in the context of a suit against a foreign state based on the implementation of a treaty with the United States, Mexico respectfully submits that that decision should be reviewed.

IV.

THE ASSERTION OF JURISDICTION OVER MEXICO UNDER THE CIRCUMSTANCES OF THIS CASE VIOLATES DUE PROCESS

This Court has in several decisions formulated tests for determining whether the exercise of personal jurisdiction over foreign defendants would comport with due process. In *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), this Court stated that constitutional due process is satisfied if the defendant has sufficient contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." Later, in *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court held that the defendant must have performed some act by which it "purposefully availed itself" of the "benefits and protections" of the forum's laws. More recently, in *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), this Court has explained the

due process standard in terms of the defendant's reasonable expectations, or the foreseeability of defendant's being haled before the courts of the forum based on the contacts the defendant has with that forum.

All of the above decisions are essentially formulations of the same basic test: in each case, the defendant's contacts with the forum must be examined to determine whether it is fair to hold the defendant to the reasonable anticipation of being subject to suit in the forum. In some cases, a single act in the forum, by which the defendant avails himself of the benefits and protections of that forum's laws, may constitute the requisite "minimum contacts" to satisfy due process; in others, more extensive contacts may be necessary. The analysis is not mechanical, but one designed ultimately to reach a fair result based on what the defendant should reasonably have anticipated under the circumstances of the particular case. As this Court stated in *World-Wide Volkswagen*, the element of foreseeability gives "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

In the instant case, the Ninth Circuit failed to give due weight to the element of foreseeability in its due process analysis. Rather, it labeled Mexico's implementation of the Letter of Agreement procedure a "purposeful availing" of the benefits and protections offered by the forum, and balanced a number of additional factors primarily relevant to cases involving private defendants. (A-13-19, 729 F.2d at 649-52.) (A-33-38, Amended Opinion at 14-22.) Had the plane in question been a private, commercial aircraft on a non-governmental flight, the Ninth Circuit's decision might well have been appropriate. In this case, however, the unique nature and purpose of the plane's mission and the circumstances under which it momentarily flew through U.S. airspace warrant a different result if the basic "foreseeability" test formulated by this Court is to be given effect.

Mexico had substantial reason to believe, both at the time that the Prisoner Exchange Treaty was concluded and now,

that its conduct in implementing the Prisoner Exchange Treaty would not be subject to judicial scrutiny in U.S. courts. *See* Mexican Diplomatic Note. (A-78.) Indeed, had Mexico known then that by entering into the Prisoner Exchange Treaty it could be haled before U.S. courts, it is unlikely that the Prisoner Exchange Treaty would ever have been concluded. Mexico's understanding then and now is based on well settled principles of international law, under which a sovereign state may not, without its consent, be subject to the jurisdiction of the courts of another state in respect of the performance of its governmental functions.

Mexico's reasonable expectations of immunity cannot be said to have been abrogated by the enactment of the FSIA. That statute did not become effective until January 1977, after the Prisoner Exchange Treaty was concluded. In any event, the noncommercial tort provision of the FSIA fails to provide Mexico with reasonable notice that Congress intended to subject it to suit under circumstances such as those of this case.[7]

Apart from Mexico's reasonable expectation of immunity due to the nature of the functions it was performing under the Prisoner Exchange Treaty, the nature and quality of the relevant contacts of Mexico with the forum in this case further militate against a finding of jurisdiction. Mexico cannot be said to have "purposefully availed" itself of the forum's protections for its own benefit. *Cf. Kulko*, 436 U.S. at 94. Mexico was not engaged in a routine commercial flight deriving commercial benefit from an incursion into U.S. airspace. Rather, it was performing a governmental function in implementing a treaty for the benefit of the United States and its citizens. The momentary flight over U.S. territory was not a planned part of that activity, but a response to an emergency situation. Given the fortuity of these and other circumstances

7. Among the factors weighed by the Ninth Circuit in its jurisdictional determination was the "sovereignty" of Mexico. On this issue, however, the Ninth Circuit simply made the conclusory statement that Congress intended to cover the conduct at issue here in § 1605(a)(5) and therefore Congress had legislatively determined that asserting jurisdiction would not pose an affront to the sovereignty of Mexico. (A-16-17, 729 F.2d at 650.) (A-36, Amended Opinion at 18-19.)

of this case, and Mexico's reasonable expectation of sovereign immunity based on the governmental nature of the functions it was performing, Mexico's contacts with the United States relevant to this case do not constitute the "minimum contacts" sufficient to find the reasonable expectation or foreseeability of suit required under this Court's decisions.

The importance of according foreign sovereigns the immunity from the jurisdiction of U.S. courts they reasonably expect under international law was stressed by this Court in its early decision, *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). In that seminal case on sovereign immunity, Chief Justice Marshall wrote that it is a "principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction." *Id.* at 145-46. In anticipation of legislation that might remove that immunity the Chief Justice further stated:

> Without doubt, the sovereign of the place is capable of destroying this implication. He [the receiving sovereign] may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. *But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.*

Id. at 146 (emphasis added).

The Ninth Circuit's analysis did not take into account the admonition of Chief Justice Marshall as to the necessity for a *clear* statement of intent to abrogate the immunity previously enjoyed and reasonably expected by foreign sovereigns. Nor did the court of appeals properly apply the foreseeability analysis previously elaborated in this Court's decisions on the due process issue. (A-15, 729 F.2d at 649-50.) (A-34, Amended Opinion at 14-16.) The assertion of jurisdiction over Mexico under the circumstances of this case therefore involves important constitutional questions, again in the context of issues relating to foreign relations, which require decision by this Court.

CONCLUSION

For the reasons stated above, Mexico respectfully requests that the Petition for a Writ of Certiorari hereby presented be granted.

Respectfully submitted,

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August 24, 1984

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UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Nos. 83-5626, 83-5629.

Argued and Submitted Oct. 6, 1983.

Decided March 30, 1984.

ERIN RAYNE OLSEN, a Minor by PATTY SHELDON, Maternal Grandmother and Guardian ad Litem,

Plaintiffs-Appellants,

—v.—

GOVERNMENT OF MEXICO,

Defendant-Appellee.

URSULA BAINES SANCHEZ, By and Through her Guardians ad Litem JOSEPH J. CERNIE and SALLY Z. CERNIE,

Plaintiffs-Appellants,

—v.—

THE REPUBLIC OF MEXICO, a Foreign Government,

Defendant-Appellee.

Donald S. White, Bonnie Pastor, Maupin, Cutler, Teplinsky & White, Los Angeles, Cal., for Olsen.

Mark S. Hennings, Shield & Smith, Los Angeles, Cal., for Sanchez.

Christopher J. Schatz, Ramon Castro, Jack Sleeth, Sheela, Lightner & Castro, San Diego, Cal., for defendant-appellee.

Appeal from the United States District Court
for the Southern District of California

Before

FLETCHER and NELSON, *Circuit Judges*,
and HARDY,* *District Judge*.

NELSON, Circuit Judge:

Erin Olsen and Ursula Sanchez appeal from the dismissal of their wrongful death claims for lack of personal jurisdiction. The district court held that general contracts between the defendant and the forum state provided no basis for jurisdiction. Additionally, the court concluded that personal jurisdiction based on defendant's forum-related activities would be unreasonable and thus violative of due process requirements.

On appeal, the Government of Mexico ("Mexico") also challenges subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, Pub.L. No. 94-583, 90 Stat. 2891-98, 28 U.S.C. §§ 1330, 1332(a)(2), (4), 1391(f), 1441(d), 1602-1611 (1976) [hereinafter cited as the FSIA].

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* Honorable Charles L. Hardy, United States District Judge for the District of Arizona, sitting by designation.

We find that both subject matter jurisdiction and personal jurisdiction exist and therefore reverse.

FACTS

Appellants Olsen and Sanchez, United States citizens domiciled in California, are minor children claiming the wrongful death of their parents. As prisoners of the Mexican government, the parents of appellants were to be transferred to authorities for incarceration in the United States pursuant to the Prisoner Exchange Treaty between the United States and Mexico.

On the night of October 27, 1979, a twin-propeller plane owned and operated by the Mexican government carrying guards, pilots and appellants' parents departed Monterrey, Mexico for Tijuana, where the transfer was to take place. En route, the pilots, employees of the Mexican Department of Justice, learned of thick fog and diminishing visibility at their destination. They requested an instrument landing which, at Tijuana Airport, requires the airplane to enter United States airspace so it can approach the runway from the west. Following procedures established by a Letter of Agreement between aviation authorities of the United States and Mexico, Tijuana air control sought and received permission for the airplane to cross the border. In addition to providing access to United States airspace during hazardous weather conditions, the Letter also allows for coordinated navigational assistance.

Because its radar and instrument landing navigational system were inoperative, Tijuana air control asked its counterpart in San Diego to radio direction headings, altitude and location data necessary for an instrument landing to the aircraft. Unfortunately, neither the San Diego air controllers nor the pilots were bilingual. Instead, the San Diego air controllers relayed the information via the telephone "hotline" to Tijuana air control who radioed their translation to the pilots.

In this manner, the aircraft penetrated almost 12 miles into United States airspace, made a wide turn and began to descend toward Tijuana Airport. Having strayed one mile off the

proper course, the pilot abandoned the approach at the border and re-entered Mexican airspace.

San Diego air control advised the pilot to proceed to other airports where visual landings would be possible. The pilot declined and decided to attempt another instrument landing. With the continued use of navigational data from San Diego air control, the airplane re-entered United States airspace. The pilots aligned the aircraft with the proper compass heading and descended on course, but failed to maintain the proper altitude. After striking a telephone pole, the airplane crashed three-quarters of a mile inside the United States, killing all on board. The crash site was two and one-half miles from the beginning of the runway.

DISCUSSION

The FSIA sets forth criteria which must be satisfied to establish both statutory subject matter jurisdiction and personal jurisdiction. The FSIA confers subject matter jurisdiction upon district courts in nonjury civil actions where the foreign state is not entitled to immunity as defined by its substantive provisions, 28 U.S.C. § 1330(a) (1976). Personal jurisdiction is established whenever subject matter jurisdiction exists and service of process has been made in accord with section 1608 of the FSIA. 28 U.S.C. § 1330(b) (1976). Thus, both forms of jurisdiction turn on whether the foreign state is entitled to sovereign immunity. If the dispute does not come within one of the exceptions to sovereign immunity explicitly provided by sections 1605-1607, the district court lacks both subject matter jurisdiction and personal jurisdiction.

I. Subject Matter Jurisdiction

We begin our inquiry, then, by considering whether Mexico is entitled to immunity. The FSIA grants blanket immunity to foreign states, 28 U.S.C. § 1604, and then carves out specific exceptions to immunity in sections 1605 to 1607. Appellants allege that their wrongful death claims come within the so-

called "noncommercial torts" exception, section 1605(a)(5), which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . . .
>
> (5) not otherwise encompassed in paragraph (2) above, [the commercial activity exception] in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment;

28 U.S.C. § 1605(a)(5) (1976).

Ordinarily, the plaintiff has the burden of establishing jurisdictional requirements. *KVOS, Inc. v. Associated Press,* 299 U.S. 269, 278, 57 S.Ct. 197, 200, 81 L.Ed. 183 (1936); *Forsythe v. Overmeyer,* 576 F.2d 779, 781 (9th Cir.), *cert. denied,* 439 U.S. 864, 99 S.Ct. 188, 58 L.Ed.2d 174 (1978). However, the legislative history of the FSIA indicates that because sovereign immunity is a defense to be specially pleaded, the foreign state has the ultimate burden of proving its claim of immunity. H.R.Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976) *reprinted in* 1976 U.S. Code Cong. & Admin.News, 6604 [hereinafter cited as *House Report*].[1] Once plaintiffs have alleged a basis for jurisdiction, as appellants did below, the burden shifts to the foreign state to prove immunity. *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378 (5th Cir. 1980).

Mexico argues that section 1605(a)(5) does not apply and it is therefore immune from suit. First, Mexico contends that Con-

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1 The House and Senate Committees filed identical reports and the House Report discussed herein states the views of both houses of Congress. *See* Senate Judiciary Committee, *Define Jurisdiction of U.S. Courts in Suits Against Foreign States*, S.Rep. No. 1310, 94th Cong., 2d Sess. (1976).

gress, in enacting the FSIA, adopted the restrictive theory of sovereign immunity and that Mexico's conduct was of the public nature held to be immune under that theory. Second, Mexico asserts that the 1605(a)(5) exception to immunity requires all the acts or omissions constituting the tort to occur within the United States. Finally, Mexico characterizes its activities which led to the crash as discretionary functions, thus falling within the exception to jurisdiction set forth in section 1605(a)(5)(A). We consider these arguments in turn.

A. The FSIA and the Restrictive Theory of Sovereign Immunity.

The restrictive theory of sovereign immunity, widely applied by other nations, was adhered to by the State Department from 1952 until the adoption of the FSIA. *See House Report, supra*, at 14. Under the restrictive theory, a foreign state's vulnerability to suit depended on the nature of the act about which there was a complaint. The foreign state's immunity was restricted to cases involving acts of a public or governmental nature (*jure imperii*). But if the conduct was either commercial in nature or that which a private person would normally perform (*jure gestionis*), no immunity was available. Although the theory is easily stated, consistent application of the distinction between acts *jure imperii* and *jure gestionis* has proved more difficult. *See Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 359-60 (2d Cir.1964); Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 Yale Stud. in World Pub. Ord. 1, 16 (1976).

Mexico argues that the FSIA codified the restrictive theory and that the public-private distinction applies to the noncommercial torts exception as well. According to Mexico's interpretation, foreign states would be immune from jurisdiction for those torts which otherwise come within the bounds of section 1605(a)(5) but which are public or governmental in nature. We find this interpretation untenable for several reasons.

From the outset, section 1602 instructs us to determine claims of immunity "in conformity with the principles set forth" by the FSIA. The legislative history of the FSIA explains that the statute "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." *House Report* at 12, U.S. Code Cong. & Admin. News 1976, p. 6610. Thus, the FSIA itself prevents us from engrafting onto section 1605(a)(5) an exception for non-commercial torts of a public or governmental nature. In accordance with the FSIA, then, we determine the immunity of foreign states pursuant to the scheme enacted by Congress and without regard to the distinctions made by the restrictive theory.

Our interpretation of the statutory scheme begins with the language of the statute itself. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337, 99 S.Ct. 2326, 2330, 60 L.Ed.2d 931 (1979). The language of section 1605(a)(5) is broad indeed, denying immunity in any case "in which money damages are sought against a foreign state for personal injury or death . . . caused by the tortious act or omission of that foreign state or of any official or employee . . . ." Nothing in the statutory language suggests that the nature of the tortious act is relevant to the determination of immunity.

Additionally, the legislative history of the FSIA supports an interpretation faithful to the broad language of section 1605(a)(5). While the preamble to the legislative history indicates that the bill would codify the restrictive theory, *House Report* at 7, the specific analysis of section 1605(a)(5) states that it "is cast in general terms as applying to *all* tort actions for money damages not otherwise encompassed by section 1605(a)(5) relating to commercial activities." *House Report* at 20-21, U.S. Code Cong. & Admin. News 1976, p. 6619 (emphasis added). Moreover, section 1605(a)(5) was designed to be consistent with international law which denied immunity for

"ordinary tort actions against foreign states." *Hearing on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 28 (1976) (testimony of Monroe Leigh, Legal Adviser, Department of State). Like the statutory language, nothing in the legislative history to section 1605(a)(5) indicates that it is to be construed in terms of the restrictive theory.

Mexico argues that if section 1605(a)(5) were applied without regard to the immunity accorded acts of a sovereign nature under the restrictive theory, sovereign immunity under the FSIA would provide little protection to foreign nations. This argument, however, ignores the immunity provided a foreign state for torts committed in its discretionary capacity. 28 U.S.C. § 1605(a)(5)(A) (1976). Under the discretionary function exemption, foreign states are not subject to the jurisdiction of the United States for tort claims based upon discretionary functions which, as discussed below, include those acts or decisions made at the policy-making or planning level of government. Thus, those torts which involve acts or omissions of a fundamentally governmental nature are not actionable. Thus, to a large extent, the FSIA immunizes foreign states for torts which occur in the state's governmental capacity.

B. The Location of the Tortious Conduct.

Section 1605(a)(5) requires the injury complained of to occur in the United States.[2] The provision does not indicate that the conduct causing the tort must also take place in the United States. Ordinarily, this would end our inquiry and there would be no need to consider the location of the tortious conduct. Where, as in the instant case, the injuries occurred in the

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2 Section 1605(a)(5) specifies that foreign states are not immune from jurisdiction in any case in which money damages are sought "for personel injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state . . ." 28 U.S.C. § 1605(a)(5) (1976).

United States, and all other requirements of section 1605(a)(5) are met, the foreign state would not be immune. However, the legislative history to section 1605(a)(5) clearly states that "the tortious act or omission must occur within the jurisdiction of the United States . . . ." *House Report* at 21, U.S. Code Cong. & Admin. News 1976, p. 6619.

A careful reading of the record in this case suggests that many potentially tortious acts and omissions occurring both in Mexico and the United States caused the crash. Pilot error, the absence of operational radar and navigational aids at Tijuana airport, defective aircraft instruments, the decision to forego a visual landing at another airport, inaccurate data from San Diego air control, and other factors may have contributed causally to the accident.

Mexico, relying on *Matter of SEDCO*, 543 F.Supp. 561, 567 (S.D.Tex.1982) (*SEDCO*), contends that section 1605(a)(5) must be construed to require all of the tortious conduct to occur in the United States before a foreign state will be denied immunity. In *SEDCO*, an exploratory off-shore well operated by Pemex, the Mexican national oil company, exploded in Mexican waters. The resulting oil slick washed up on the shores of Texas. Citizens there sued Pemex and other parties under section 1605(a)(5). Citing that section's legislative history requiring the tortious act or omission to occur within the United States, the court held that for the noncommercial tort exception to apply, "the tort, in whole, must occur in the United States." *SEDCO*, 543 F.Supp. at 567.[3] Thus, Mexico argues, because some allegedly tortious acts or omissions took place outside the United States—such as the maintenance of the aircraft and the inoperative radar at Tijuana airport—Mexico should be immune.

The instant case is dintinguishable from *SEDCO* in one crucial respect. In *SEDCO*, *none* of the alleged acts or omis-

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3 *See also Perez v. The Bahamas*, 652 F.2d 186, 188-89 (D.C.Cir.), *cert. denied*, 454 U.S. 865, 102 S.Ct. 326, 70 L.Ed.2d 166 (1981). In *Perez* both the tortious conduct and injury occurred outside the jurisdiction of the United States. *Perez* is thus distinguishable.

sions, only the resultant injury, occurred in the United States.[4] By requiring every aspect of the tortious conduct to occur in the United States, a rule such as in *SEDCO* would encourage foreign states to allege that some tortious conduct occurred outside the United States. The foreign state would thus be able to establish immunity and diminish the rights of injured persons seeking recovery. Such a result contradicts the purpose of the FSIA, which is to "serve the interests of justice and . . . protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602. The FSIA requires us to protect the rights of plaintiffs while respecting the sovereignty of foreign states. Consequently, we hold that if plaintiffs allege at least one entire tort occurring in the United States, they may claim under section 1605(a)(5). In this case, appellants allege conduct constituting a single tort—the negligent piloting of the aircraft—which occurred in the United States. We are satisfied that appellants have alleged sufficient conduct occurring in the United States to bring this case within the non-commercial torts exception as expressed in section 1605(a)(5) and its legislative history.

C. The Discretionary Function Exception.

Section 1605(a)(5)(A) provides an exception to noncommercial tort jurisdiction for claims based upon a state's discretionary function.[5] Mexico seeks to bring the airplane crash within this exception by contending that the conduct which led to the crash was discretionary.

The FSIA provides considerable guidance as to which acts or decisions constitute discretionary functions. Not only does the

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4 *See Also Persinger v. Islamic Republic of Iran*, No. 81-2003 (D.C.Cir., filed March 13, 1984) (distinguishable on same grounds).

5 Section 1605(a)(5) does not apply to:

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether discretion be abused.

28 U.S.C. § 1605(a)(5)(A) (1976).

language of the FSIA discretionary function exception replicate that of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a), but the legislative history of the FSIA, in explaining section 1605(a)(5)(A), directs us to the FTGA. *House Report* at 21. To determine the scope of the discretionary function exception of the FSIA, we therefore turn to the interpretation given the similar FTCA provision.[6]

The seminal case defining the scope of the discretionary function exception within the context of the FTCA, *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), held "discretion" to mean:

> "more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."

Id. at 35-36, 73 S.Ct. at 968. In so defining discretion, the Court adhered to the legislative purpose behind the exception: to allow government executives to make policy decisions in an atmosphere free of concern over possible litigation. *Id.* at 32, 73 S.Ct. at 966.

Over the years, the definition of discretion has been refined and qualified somewhat. *See Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir.1975). This circuit employs a test which distinguishes between the "planning level" of governmental activity and those acts designed to carry out policy, the "operational level." *Thompson v. United States*, 592 F.2d 1104, 1111 (9th Cir.1979). Because decisions at the planning level establish governmental policy, they are not actionable. But where decisions occur at the operational level, the discretionary function

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6 The Federal Tort Claims Act does not apply to:

> (a) Any claim . . . based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1976).

exemption provides no protection from liability even though such decisions or acts may involve elements of discretion. *Lindgren v. United States*, 665 F.2d 978, 980 (9th Cir.1982); *see also Thompson*, 592 F.2d at 1111; *Driscoll*, 525 F.2d at 138. In addition to examining the level at which the conduct occurred, we also consider two other factors which are particularly important when determining the immunity of foreign states: The ability of United States courts to evaluate the act or omission of the state, and the potential impairing effect such an evaluation would have on the effective administration of the state's government. *Lindgren*, 665 F.2d at 980; *Driscoll*, 525 F.2d at 138.

We conclude that of those alleged acts or omissions on the part of Mexico which contributed to the accident, none was discretionary. First, while Mexico's decision to enter into the Prisoner Exchange Treaty with the United States or to transfer these particular prisoners to United States custody might well be deemed discretionary, those decisions are not implicated in the instant action. Rather, appellants allege that Mexico negligently maintained, directed and piloted the aircraft. Such conduct represents measures taken to implement the broader policy or plan to exchange prisoners. The acts or omissions in question involved the transportation of prisoners, an act remote from the policy decision to transfer them. While the pilot and air controllers had considerable discretion in carrying out their assigned tasks, *see Lindgren*, 665 F.2d at 980; *Thompson*, 592 F.2d at 1111; *Driscoll*, 525 F.2d at 138, it is clear they acted on the operational level, far from the centers of policy judgment. *See also Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 238 (2d Cir.1967) (air controller's failure to comply with regulations occurred at operational level); *United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 396 (9th Cir.1964); *Eastern Air Lines v. Union Trust Co.*, 221 F2d 62, 78 (D.C. Cir.1955) (control tower operators act at operational level).

Second, this dispute does not raise questions of policy decisions of Mexico, only issues of historical fact and tort liability. Therefore, the trial court can readily evaluate the

allegedly tortious acts as it is well suited to the task of determining facts and applying the relevant law.

Third, we see nothing which suggests that denying immunity will impair the effectiveness of Mexico's penal or aviation authorities. A trial on the merits will call for the testimony of individuals involved in the accident, primarily Mexican air traffic control personnel. There seems little doubt that the air traffic authorities and other relevant governmental entities can function without diminished efficacy while their employees testify in discovery or court proceedings.

In conclusion, the claims asserted by appellants fall within the exception to immunity for noncommercial torts as provided by section 1605(a)(5) of the FSIA. Additionally, the conduct of Mexican personnel which may have led to the crash occurred at the operational level and was not discretionary. Thus, Mexico is not immune under the FSIA and subject matter jurisdiction exists.

II. Personal Jurisdiction

Personal jurisdiction over a foreign state exists in any case where the foreign state is not entitled to immunity under the FSIA and service has been made in accordance with the statute's requirements. 28 U.S.C. § 1330(b) (1976). There being no challenge to the propriety of service below, we must consider whether the assertion of personal jurisdiction comports with the constitutional limits imposed by the due process clause. Because California's long-arm statute extends the state's jurisdiction to the very limits of due process under the federal constitution, we examine personal jurisdiction in light of due process as defined by the United States Supreme Court. *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1250 (9th Cir.1980), (quoting *Threlkeld v. Tucker*, 496 F.2d 1101, 1103 (9th Cir.1974)), *cert. denied*, 419 U.S. 1023, 95 S.Ct. 499, 42 L.Ed.2d 297 (1974). As stated in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), due process requirements are met only if the defendant has sufficient minimum contacts

with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id*, at 816, 66 S.Ct. at 158.

In our circuit, the defendant's contacts with the forum state are analyzed in two ways. If the non-resident defendant's activities within a state are "substantial" or "continuous and systematic," there is a sufficient relationship between the defendant and forum to support jurisdiction even if the cause of action is unrelated to the defendant's forum-related activities. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446-48, 72 S.Ct. 413, 418-19, 96 L.Ed. 485 (1952); *Data Disc, Inc., v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1287 (9th Cir.1977). If, however, the defendant's activities are not so pervasive as to subject the defendant to general jurisdiction, personal jurisdiction turns on the nature and quality of the defendant's contacts relating specifically to the cause of action. *Data Disc*, 557 F.2d at 1287. To find limited jurisdiction based on the defendant's forum-related activities, we require (1) the non-resident defendant to perform some act by which he purposefully avails himself of the benefits and protections of the forum's laws; (2) the plaintiff's claim to arise out of or result from the defendant's forum-related activities, and; (3) the exercise of jurisdiction to be reasonable. *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 397 (9th Cir. 1983); *Data Disc*, 557 F.2d at 1287. Because we find sufficient contacts to justify limited jurisdiction, it is unnecessary to consider whether general jurisdiction exists.

The first two requirements of the *Data Disc* minimum contacts analysis are easily satisfied. In order to land during hazardous weather conditions, the pilot of the aircraft sought and received permission to enter United States airspace pursuant to procedures negotiated for precisely those circumstances. While receiving navigational assistance for San Diego air control, the pilot twice intentionally entered United States airspace. In so doing, Mexico purposefully availed itself of the benefits of operating its aircraft over California. In addition, the claims of appellants arise from the plane's flight and crash in California.

Jurisdiction is reasonable where "under the totality of the circumstances the defendant could reasonably anticipate being called upon to present a defense in a distant forum." *Taubler v. Giraud*, 655 F.2d 991, 993 (9th Cir.1981); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). While there is no mechanical or quantitative test for determining the reasonableness of jurisdiction, at least seven factors are relevant. *Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir.1981) [hereinafter cited as *I.N.A.*]. To determine reasonableness, we consider the relative significance of each factor and balance them all. *Id.* at 1273. We apply these factors below and conclude that personal jurisdiction over Mexico is reasonable.

A. Extent of Purposeful Interjection.

The extent of Mexico's purposeful interjection into California was substantial. The pilots intentionally entered United States airspace with the approval of Tijuana air control in order to make an instrument landing. While the decision to enter was made under exigent circumstances, the flight over California was neither accidental nor fortuitous. The pilot and Tijuana air control followed detailed procedures agreed to by Mexico and set forth in the Letter of Agreement in anticipation of weather conditions necessitating instrument landings. Furthermore, after the second missed approach, the pilot rejected a suggestion to land the aircraft at alternate airports in favor of another instrument approach over San Diego.

B. Burden of Defending.

While a primary concern in assessing the reasonableness of jurisdiction is the burden on the defendant, it is not dispositive and is to be considered in light of other relevant factors. *Raffaele*, 707 F.2d at 398; *World-Wide Volkswagen*, 444 U.S. at 292, 100 S.Ct. at 564.

Undoubtedly, litigating abroad imposes significant inconveniences upon the party appearing in a foreign country. Transpor-

tation of witnesses, attorneys and physical evidence presents problems of logistics and expense, as does the need to translate testimony and documents. However, these inconveniences are minimized in the instant case. The physical evidence, including the wreckage and crash site, is located in San Diego. Other evidence, such as National Transportation Safety Board (NTSB) reports and the testimony of San Diego air traffic controllers and NTSB investigators, is in English and is available in San Diego as well. Additionally, advances in international transportation and communication facilities have diminished many of the burdens of litigating in a foreign nation. *See Raffaele*, 707 F.2d at 398; *Hanson v. Denckla*, 357 U.S. 235, 251, 78 S.Ct. 1228, 1238, 2 L.Ed.2d 1283 (1958). Important Mexican witnesses, such as the Tijuana air traffic controllers, are located just across the border and are readily accessible via modern transportation and communication links. Litigating the instant case in San Diego is far less burdensome to the defendant than much of the interstate litigation routinely pursued in the United States. Indeed, the burden on Mexico to defend in San Diego is as small as any foreign defendant may be expected to bear. *Compare INA*, 649 F.2d at 1271-72; *Raffaele*, 707 F.2d at 398; *Hedrick v. Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355, 1359 (9th Cir.1983).

C. Conflict with Mexico's Sovereignty.

Mexico argues that its sovereignty raises a barrier to the reasonableness of jurisdiction. As was recognized in INA, the reasonableness of jurisdiction depends to some extent on the potential affront to the sovereignty of defendant's state. *INA*, 649 F.2d at 1272. While a defendant's sovereignty may weigh against allowing jurisdiction, that effect is minimal here. By denying immunity to foreign states defending certain claims, the FSIA reflects the modern realities of the interdependence of nations. Because personal jurisdiction turns on a determination of immunity, the FSIA represents Congress' decision that jurisdiction does not pose an affront to the sovereignty of the defending nation so serious as to preclude it. Thus, while we

are respectful of Mexico's sovereignty, we find that in the present case it does not weigh heavily against the reasonableness of jurisdiction.

D. Interests of Forum State.

California has strong interests in protecting its residents from injury and in furnishing a forum where their injuries may be remedied. *Raffaele*, 707 F.2d at 398. It has a special interest in exercising jurisdiction over those who have committed tortious acts within its boundaries. By subjecting the tortfeasor to liability for damages which are the proximate result of the tort, California acts to deter wrongful conduct affecting those within the state. *Data Disc*, 557 F.2d at 1288.

In addition, California also had an interest in ensuring that its citizens are fully compensated for their injuries. Such an interest is important both to ensure that injured individuals recover for their losses and to protect the state's economic resources from unnecessary expenditures. Finally, the forum state's interest in protecting the welfare of its minor residents is unquestionably important. *Kulko v. California Superior Court*, 436 U.S. 84, 98, 98 S.Ct. 1690, 1700, 56 L.Ed.2d 132 (1978).

E. Most Efficient Resolution.

District court in San Diego would be the most efficient judicial forum. A court sitting in the district where the injury occurred and where the evidence is located ordinarily will be the most efficient forum. *Raffaele*, 707 F.2d at 399. As discussed above, San Diego will most likely be the richest source of physical evidence, witnesses and documents.

The district court is required to apply California's choice of law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). If Mexican law should apply, that would admittedly have a negative effect on the efficiency of proceeding in the United States. *INA*, 649 F.2d at 1273. However, we cannot tell from the briefs or record whether a true conflict of law exists. Mexico has not shown

how its law conflicts with relevant California law or why its law should be applied. In any event, we are confident that a court in California can be trusted to apply properly the law of a foreign state. Thus, choice of law considerations are not a major impediment to the efficient resolution of this dispute.

F. Convenient and Effective Relief for Plaintiffs.

Undoubtedly, a California court affords appellants the most convenient and effective site for judicial relief. Not only is important evidence present in the United States, but concerns for appellants' personal comfort and convenience argue in favor of a United States forum. As this court observed in *Raffaele,* "Individual claimants 'would be at a severe disadvantage if they were forced to follow the . . . [defendant] to a distant state in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof.' " *Raffaele,* 707 F.2d at 399 (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957)). Access to a California court is important to appellants for obtaining relief.

Finally, appellants' likelihood of enforcing a judgment against Mexico also bears on the effectiveness of a California court as a forum for resolving the dispute. *INA*, 649 F.2d at 1273. Mexico is not immune to jurisdiction and thus enforcement of a judgment is not barred. Mexico has not shown how a judgment against it is unenforceable and thus we cannot conclude that such enforcement is so unlikely as to weigh against the reasonableness of jurisdiction.

G. Availability of an Alternate Forum.

Appellants recognize that Mexico affords an alternative forum but argue that it is, for practical purposes, unavailable. While the practicality of the alternative forum must be considered, *see Raffaele,* 707 F.2d at 399; *Hedrick,* 715 F.2d at 1359, appellants must carry the burden of proving the unavailability

of an alternative forum. *INA*, 649 F.2d at 1273. Appellants allude to a severe maximum limit on wrongful death recoveries, *see Hurtado v. Superior Court,* 11 Cal.3d 574, 578-79, 114 Cal.Rptr. 106, 108, 522 P.2d 666, 668 (1974), but offer no proof of applicable Mexican law to substantiate their allegation. Because appellants fail to carry their burden of proof, we cannot conclude that they are left without an alternative forum.

After considering all the relevant factors, we conclude that, on balance, it would be reasonable for a California court to exercise jurisdiction over Mexico and thus, personal jurisdiction is consistent with due process requirements.

REVERSED AND REMANDED.

Order of the United States Court of Appeals for the Ninth Circuit denying appellees' motion for a stay of mandate, filed April 23, 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5626

D.C. No. CV 82-0413-JLI

ERIN RAYNE OLSEN, a Minor by PATTY SHELDON, Maternal Grandmother and Guardian ad Litem,

Plaintiffs-Appellants,

vs.

GOVERNMENT OF MEXICO,

Defendant-Appellee.

No. 83-5629

D.C. No. CV 81-1067-JLI

URSULA BAINES SANCHEZ, by and through her Guardians ad Litem JOSEPH J. CERNIE and SALLY Z. CERNIE,

Plaintiffs-Appellants,

vs.

THE REPUBLIC OF MEXICO, a Foreign Government,

Defendant-Appellee.

Before:

FLETCHER and NELSON, *Circuit Judges*,
and HARDY*, *District Judge*.

ORDER

Appellees' motion for a stay of mandate is DENIED.

* Honorable Charles L. Hardy, United States District Judge for the District of Arizona, sitting by designation.

Order of the United States Court of Appeals for the Ninth Circuit vacating its order and recalling the mandate, filed May 3, 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 83-5626 & 83-5629

DC# CV-82-0413 JLI
Southern California

ERIN RAYNE OLSEN a Minor by PATTY SHELDON,
Maternal Grandmother and Guardian ad Litem,

Plaintiffs-Appellants,

vs.

GOVERNMENT OF MEXICO,

Defendant-Appellee.

Before:

FLETCHER and NELSON, *Circuit Judges*,
and Hardy, D.J.

ORDER

Upon its own motion the court vacates the order of April 23, 1984. The mandate is recalled. The panel will issue an amended opinion at its earliest opportunity.

Amended Opinion of the United States Court of Appeals for the Ninth Circuit, dated July 16, 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5626

USDC No. CV 82-0413-JLI

ERIN RAYNE OLSEN, a Minor by PATTY SHELDON, Maternal Grandmother and Guardian ad Litem,

Plaintiffs-Appellants,

—vs.—

GOVERNMENT OF MEXICO,

Defendant-Appellee.

No. 83-5629

USDC No. CV-81-1067-JLI

URSULA BAINES SANCHEZ, by and through her Guardians ad Litem JOSEPH J. CERNIE and SALLY Z. CERNIE,

Plaintiffs-Appellants,

—vs.—

THE REPUBLIC OF MEXICO, a Foreign Government,

Defendant-Appellee.

AMENDED OPINION

Argued and Submitted: October 6, 1983

Appeal from the United States District Court
for the Southern District of California
Hon. J. Lawrence Irving, District Judge Presiding

Before:

FLETCHER and NELSON, *Circuit Judges,*
and HARDY,* *District Judge.*

NELSON, *Circuit Judge:*

Erin Olsen and Ursula Sanchez appeal from the dismissal of their wrongful death claims for lack of personal jurisdiction. The district court held that general contacts between the defendant and the forum state provided no basis for jurisdiction. Additionally, the court concluded that personal jurisdiction based on defendant's forum-related activities would be unreasonable and thus violative of due process requirements.

On appeal, the Government of Mexico ("Mexico") also challenges subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891-98, 28 U.S.C. §§ 1330, 1332(a)(2), (4), 1391(f), 1441(d), 1602-1611 (1980) [hereinafter cited as the FSIA].

We find that both subject matter jurisdiction and personal jurisdiction exist and therefore reverse.

FACTS

Appellants Olsen and Sanchez, United States citizens domiciled in California, are minor children claiming the wrongful

* Honorable Charles L. Hardy, United States District Judge for the District of Arizona, sitting by designation.

death of their parents. As prisoners of the Mexican government, the parents of appellants were to be transferred to authorities for incarceration in the United States pursuant to the Prisoner Exchange Treaty between the United States and Mexico.

On the night of October 27, 1979, a twin-propeller plane owned and operated by the Mexican government carrying guards, pilots and appellants' parents departed Monterrey, Mexico for Tijuana, where the transfer was to take place. En route, the pilots, employees of the Mexican Department of Justice, learned of thick fog and diminishing visibility at their destination. They requested an instrument landing which, at Tijuana Airport, requires the airplane to enter United States airspace so it can approach the runway from the west. Following procedures established by a Letter of Agreement between aviation authorities of the United States and Mexico, Tijuana air control sought and received permission for the airplane to cross the border. In addition to providing access to United States airspace during hazardous weather conditions, the Letter also allows for coordinated navigational assistance.

Because its radar and instrument landing navigational systems were inoperative, Tijuana air control asked its counterpart in San Diego to radio direction headings, altitude and location data necessary for an instrument landing to the aircraft. Unfortunately, neither the San Diego air controllers nor the pilots were bilingual. Instead, the San Diego air controllers relayed the information via the telephone "hotline" to Tijuana air control which radioed a translation to the pilots.

In this manner, the aircraft penetrated almost 12 miles into United States airspace, made a wide turn and began to descend toward Tijuana Airport. Having strayed one mile off the proper course, the pilot abandoned the approach at the border and re-entered Mexican airspace.

San Diego air control advised the pilot to proceed to other airports where visual landings would be possible. The pilot declined and decided to attempt another instrument landing. With the continued use of navigational data from San Diego

air control, the airplane re-entered United States airspace. The pilots aligned the aircraft with the proper compass heading and descended on course, but failed to maintain the proper altitude. After striking a telephone pole, the airplane crashed three-quarters of a mile inside the United States, killing all on board. The crash site was two and one-half miles from the beginning of the runway.

DISCUSSION

The FSIA sets forth criteria which must be satisfied to establish both statutory subject matter jurisdiction and personal jurisdiction. The FSIA confers subject matter jurisdiction upon district courts in nonjury civil actions where the foreign state is not entitled to immunity as defined by the FSIA's substantive provisions, 28 U.S.C. § 1330(a) (1982). Personal jurisdiction is established whenever subject matter jurisdiction exists and service of process has been made in accord with section 1608 of the FSIA. 28 U.S.C. § 1330(b) (1982). Thus, both forms of jurisdiction turn on whether the foreign state is entitled to sovereign immunity. If the dispute does not come within one of the exceptions to sovereign immunity explicitly provided by sections 1605-1607, the district court lacks both subject matter jurisdiction and personal jurisdiction.

I. Subject Matter Jurisdiction

As section 1330(a) indicates, sovereign immunity is not merely a defense under the FSIA. Its absence is a jurisdictional requirement. *See Verlinden, B.V. v. Central Bank of Nigeria,* 103 S. Ct. 1962, 1971 n.20 (1983) ("*Verlinden*"). We begin our inquiry, therefore, by considering whether Mexico is entitled to immunity.

The FSIA grants blanket immunity to foreign states, 28 U.S.C. § 1604, and then carves out specific exceptions to immunity in sections 1605 to 1607. Appellants allege that their wrongful death claims come within the so-called "noncommercial torts" exception, section 1605(a)(5), which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> * * *
>
> (5) not otherwise encompassed in paragraph (2) above, [the commercial activity exception] in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment;

28 U.S.C. § 1605(a)(5) (1982).

Mexico argues that section 1605(a)(5) does not apply and it is therefore immune from suit. First, Mexico contends that Congress, in enacting the FSIA, adopted the restrictive theory of sovereign immunity and that Mexico's conduct was of the public nature held to be immune under that theory. Second, Mexico asserts that the 1605(a)(5) exception to immunity requires all the acts or omissions constituting the tort to occur within the United States. Finally, Mexico characterizes its activities which led to the crash as discretionary functions, thus falling within the exception to jurisdiction set forth in section 1605(a)(5)(A). We consider these arguments in turn.

A. The FSIA and the Restrictive Theory of Sovereign Immunity.

It is clear that the FSIA, for the most part, codifies the restrictive principle of sovereign immunity. *See Verlinden,* 103 S. Ct. at 1968. Under this principle, the immunity of a foreign state is "restricted" to suits involving that state's public acts (jure imperii) and does not extend to suits based on its private or commercial acts (jure gestionis). *McKeel v. Islamic Republic of Iran,* 722 F.2d 582, 587 n.6 (9th Cir. 1983).

Mexico argues that this public/private distinction applies not only to the FSIA generally, but specifically to section 1605 (a)(5), the noncommercial torts exception to immunity. Ac-

cording to Mexico's interpretation, foreign states would be immune from jurisdiction for those torts which otherwise come within the bounds of section 1605 (a)(5) but which are public in nature.

Section 1605 (a)(5) cannot be read, however, other than in conjunction with section 1605 (a)(5)(A), which exempts from the reach of section 1605 (a)(5) those torts committed in a foreign state's discretionary capacity. 28 U.S.C. § 1605 (a)(5)(A) (1982). Discretionary functions, as discussed below, include those acts or decisions made at the policy-making or planning level of government. Those torts involving acts or omissions of a fundamentally governmental nature are not actionable. Thus, despite section 1605 (a)(5), a foreign state remains largely immunized from torts committed in its governmental capacity. Mexico's position, that governmental acts are automatically read out of section 1605 (a)(5), would render section 1605 (a)(5)(A) superfluous. Its argument is therefore untenable.

B. The Location of the Tortious Conduct.

Section 1605 (a)(5)requires the injury complained of to occur in the United States.[1] The provision does not indicate that the conduct causing the tort must also take place in the United States. Ordinarily, this would end our inquiry and there would be no need to consider the location of the tortious conduct. Where, as in the instant case, the injuries occurred in the United States, and all other requirements of section 1605 (a)(5) are met, the foreign state would not be immune. However, the legislative history to section 1605 (a)(5) indicates that "the tortious act or omission must occur within the jurisdiction of the United States. . . ." *House Report* at 21.

A careful reading of the record in this case suggests that many potentially tortious acts and omissions occurring both in

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1 Section 1605 (a)(5) specifies that foreign states are not immune from jurisdiction in any case in which money damages are sought "for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state . . . " 28 U.S.C. § 1605(a)(5)(1982).

Mexico and the United States caused the crash. Pilot error, the absence of operational radar and navigational aids at Tijuana airport, defective aircraft instruments, the decision to forego a visual landing at another airport, inaccurate data from San Diego air control, and other factors may have contributed causally to the accident.

Mexico, relying on *Matter of SEDCO*, 543 F. Supp. 561, 567 (S.D. Tex. 1982) (*SEDCO*), contends that section 1605 (a)(5) must be construed to require all of the tortious conduct to occur in the United States before a foreign state will be denied immunity. In *SEDCO*, an exploratory off-shore well operated by Pemex, the Mexican national oil company, exploded in Mexican waters. The resulting oil slick washed up on the shores of Texas. Citizens there sued Pemex and other parties under section 1605 (a)(5). Citing that section's legislative history requiring the tortious act or omission to occur within the United States, the court held that for the noncommercial tort exception to apply, "the tort, in whole, must occur in the United States." *SEDCO*, 543 F. Supp. at 567.[2] Thus, Mexico argues, because some allegedly tortious acts or omissions took place outside the United States—such as the maintenance of the aircraft and the inoperative radar at Tijuana airport—Mexico should be immune.

The instant case is distinguishable from *SEDCO* in one crucial respect. In *SEDCO*, *none* of the alleged acts or omissions, only the resultant injury, occurred in the United States. [3] By requiring every aspect of the tortious conduct to occur in the United States, a rule such as in *SEDCO* would encourage foreign states to allege that some tortious conduct occurred outside the United States. The foreign state would thus be able to establish immunity and diminish the rights of injured persons seeking recovery. Such a result contradicts the purpose

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2 *See also Perez v. The Bahamas*, 652 F.2d 186, 188-89 (D.C. Cir.), *cert. denied*, 454 U.S. 865 (1981). *Perez* is distinguishable from this case because both the tortious conduct and injury occurred outside the United States.

3 *See also Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984) (distinguishable on same grounds).

of the FSIA, which is to "serve the interests of justice and . . . protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602. The FSIA requires us to protect the rights of plaintiffs while respecting the sovereignty of foreign states. Consequently, we hold that if plaintiffs allege at least one entire tort occurring in the United States, they may claim under section 1605 (a)(5). In this case, appellants allege conduct constituting a single tort—the negligent piloting of the aircraft—which occurred in the United States. We are satisfied that appellants have alleged sufficient conduct occurring in the United States to bring this case within the noncommercial torts exception as expressed in section 1605 (a)(5) and its legislative history.

C. The Discretionary Function Exception.

Section 1605 (a)(5)(A) provides an exception to noncommercial tort jurisdiction for claims based upon a state's discretionary function.[4] Mexico seeks to bring the airplane crash within this exception by contending that the conduct which led to the crash was discretionary.

The FSIA provides considerable guidance as to which acts or decisions constitute discretionary functions. Not only does the language of the FSIA discretionary function exception replicate that of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a), but the legislative history of the FSIA, in explaining section 1605 (a)(5)(A), directs us to the FTCA. *House Report* at 21. To determine the scope of the discretionary function exception of the FSIA, we therefore turn to the interpretation given the similar FTCA provision.[5]

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4 Section 1605 (a)(5) does not apply to:

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether discretion be abused.

28 U.S.C. § 1605(a)(5)(A)(1982).

5 The Federal Tort Claims Act does not apply to:

(a) Any claim . . . based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a

The seminal case defining the scope of the discretionary function exception within the context of the FTCA, *Dalehite v. United States*, 346 U.S. 15 (1953), held "discretion" to mean:

> "more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion."

Id. at 35-6. In so defining discretion, the Court adhered to the legislative purpose behind the exception: to allow government executives to make policy decisions in an atmosphere free of concern over possible litigation. *Id.* at 32.

Over the years, the definition of discretion has been refined and qualified somewhat. *See Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir. 1975). This circuit employs a test which distinguishes between the "planning level" of governmental activity and those acts designed to carry out policy, the "operational level." *Thompson v. United States*, 592 F.2d 1104, 1111 (9th Cir. 1979). Because decisions at the planning level establish governmental policy, they are not actionable. But where decisions occur at the operational level, the discretionary function exemption provides no protection from liability even though such decisions or acts may involve elements of discretion. *Lindgren v. United States*, 665 F.2d 978, 980 (9th Cir. 1982); *see also Thompson*, 592 F.2d at 1111; *Driscoll*, 525 F.2d at 138. In addition to examining the level at which the conduct occurred, we also consider two other factors which are particularly important when determining the immunity of foreign states: the ability of United States courts to evaluate the act or omission of the state, and the potential impairing effect such an evaluation would have on the effective administration of the state's government. *Lindgren*, 665 F.2d at 980; *Driscoll*, 525 F.2d at 138.

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federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a)(1982).

We conclude that of those alleged acts or omissions on the part of Mexico which contributed to the accident, none was discretionary. First, while Mexico's decision to enter into the Prisoner Exchange Treaty with the United States or to transfer these particular prisoners to United States custody might well be deemed discretionary, those decisions are not implicated in the instant action. Rather, appellants allege that Mexico negligently maintained, directed and piloted the aircraft. Such conduct represents measures taken to implement the broader policy or plan to exchange prisoners. The acts or omissions in question involved the transportation of prisoners, an act remote from the policy decision to transfer them. While the pilot and air controllers had considerable discretion in carrying out their assigned tasks, *see Lindgren*, 665 F.2d at 980; *Thompson*, 592 F.2d at 1111; *Driscoll*, 525 F.2d at 138, it is clear that they acted on the operational level, far from the centers of policy judgment. *See also Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 238 (2d Cir. 1967) (air controller's failure to comply with regulations occurred at operational level); *United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 396 (9th Cir. 1964); *Eastern Air Lines v. Union Trust Co.*, 221 F.2d 62, 78 (D.C. Cir. 1955)(control tower operators act at operational level).

Second, this dispute does not raise questions of policy decisions of Mexico, only issues of historical fact and tort liability. Therefore, the trial court can readily evaluate the allegedly tortious acts as it is well suited to the task of determining facts and applying the relevant law.

Third, we see nothing which suggests that denying immunity will impair the effectiveness of Mexico's penal or aviation authorities. A trial on the merits will call for the testimony of individuals involved in the accident, primarily Mexican air traffic control personnel. There seems little doubt that the air traffic authorities and other relevant governmental entities can function without diminished efficacy while their employees testify in discovery or court proceedings.

In conclusion, the claims asserted by appellants fall within the exception to immunity for noncommercial torts as pro-

vided by section 1605 (a)(5) of the FSIA. Additionally, the conduct of Mexican personnel which may have led to the crash occurred at the operational level and was not discretionary. Thus, Mexico is not immune under the FSIA and subject matter jurisdiction exists.

II. Personal Jurisdiction

Personal jurisdiction over a foreign state exists in any case where the foreign state is not entitled to immunity under the FSIA and service has been made in accordance with the statute's requirements. 28 U.S.C. § 1330(b)(1982). There has been no assertion that service did not comply with the statute, but we must still consider whether the exercise of personal jurisdiction exceeds the constitutional limits imposed by the due process clause. Because California's long-arm statute extends the state's jurisdiction to the very limits of due process uder the federal constitution, we examine personal jurisdiction in light of due process as defined by the United States Supreme Court. *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1250 (9th Cir. 1980) (quoting *Threlkeld v. Tucker*, 496 F.2d 1101, 1103 (9th Cir. 1974)), *cert. denied*, 419 U.S. 1023 (1974). As stated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), due process requirements are met only if the defendant has sufficient minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316.

In our circuit, the defendant's contacts with the forum state are analyzed in two ways. If the non-resident defendant's activities within a state are "substantial" or "continuous and systematic," there is a sufficient relationship between the defendant and forum to support jurisdiction even if the cause of action is unrelated to the defendant's forum-related activities: *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446-48 (1952); *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977). If, however, the defendant's activities are not so pervasive as to subject the

defendant to general jurisdiction, personal jurisdiction turns on the nature and quality of the defendant's contacts relating specifically to the cause of action. *Data Disc*, 557 F.2d at 1287. To find limited jurisdiction based on the defendant's forum-related activities, we require (1) the non-resident defendant to perform some act by which he purposefully avails himself of the benefits and protections of the forum's laws; (2) the plaintiff's claim to arise out of or result from the defendant's forum-related activities, and (3) the exercise of jurisdiction to be reasonable. *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 397 (9th Cir. 1983); *Data Disc*, 557 F.2d at 1287. Because we find sufficient contacts to justify limited jurisdiction, it is unnecessary to consider whether general jurisdiction exists.

The first two requrements of the *Data Disc* minimum contacts analysis are easily satisfied. In order to land during hazardous weather conditions, the pilot of the aircraft sought and received permission to enter United States airspace pursuant to procedures negotiated for precisely those circumstances. While receiving navigational assistance from San Diego air control, the pilot twice intentionally entered United States airspace. In so doing, Mexico purposefully availed itself of the benefits of operating its aircraft over California. In addition, the claims of appellants arise from the plane's flight and crash in California.

Jurisdiction is reasonable where "under the totality of the circumstances the defendant could reasonably anticipate being called upon to present a defense in a distant forum." *Taubler v. Giraud*, 655 F.2d 991, 993 (9th Cir. 1981); *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 297 (1980). While there is no mechanical or quantitative test for determining the reasonableness of jurisdiction, at least seven factors are relevant. *Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981) [hereinafter cited as *I.N.A.*]. To determine reasonableness, we consider the relative significance of each factor and balance them all. *Id.* at 1273. We apply these factors below and conclude that personal jurisdiction over Mexico is reasonable.

A. Extent of Purposeful Interjection.

The extent of Mexico's purposeful interjection into California was substantial. The pilots intentionally entered United States airspace with the approval of Tijuana air control in order to make an instrument landing. While the decision to enter was made under exigent circumstances, the flight over California was neither accidental nor fortuitous. The pilot and Tijuana air control followed detailed procedures agreed to by Mexico and set forth in the Letter of Agreement in anticipation of weather conditions necessitating instrument landings. Furthermore, after the second missed approach, the pilot rejected a suggestion to land the aircraft at alternate airports in favor of another instrument approach over San Diego.

B. Burden of Defending.

While a primary concern in assessing the reasonableness of jurisdiction is the burden on the defendant, it is not dispositive and is to be considered in light of other relevant factors. *World-Wide Volkswagen*, 444 U.S. at 292; *Raffaele*, 707 F.2d at 398.

Undoubtedly, litigating abroad imposes significant inconveniences upon the party appearing in a foreign country. Transportation of witnesses, attorneys and physical evidence presents problems of logistics and expense, as does the need to translate testimony and documents. However, these inconveniences are minimized in the instant case. The physical evidence, including the wreckage and crash site, is located in San Diego. Other evidence, such as National Transportation Safety Board (NTSB) reports and the testimony of San Diego air traffic controllers and NTSB investigators, is in English and is available in San Diego as well. Additionally, advances in international transportation and communication facilities have diminished many of the burdens of litigating in a foreign nation. *See Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *Raffaele*, 707 F.2d at 398. Important Mexican witnesses, such as the Tijuana air traffic controllers, are located just across the border and are readily accessible via modern transportation

and communication links. Litigating the instant case in San Diego is far less burdensome to the defendant than much of the interstate litigation routinely pursued in the United States. Indeed, the burden on Mexico to defend in San Diego is as small as any foreign defendant may be expected to bear. *Compare Hedrick v. Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355, 1359 (9th Cir. 1983); *Raffaele*, 707 F.2d at 398; *I.N.A.*, 649 F.2d at 1271-72.

C. Conflict with Mexico's Sovereignty.

Mexico argues that its sovereignty raises a barrier to the reasonableness of jurisdiction. As was recognized in *I.N.A.*, the reasonableness of jurisdiction depends to some extent on the potential affront to the sovereignty of defendant's state. *I.N.A.*, 649 F.2d at 1272. While a defendant's sovereignty may weigh against allowing jurisdiction, that effect is minimal here. By denying immunity to foreign states defending certain claims, the FSIA reflects the modern realities of the interdependence of nations. Because personal jurisdiction turns on a determination of immunity, the FSIA represents Congress' decision that jurisdiction does not pose an affront to the sovereignty of the defending nation so serious as to preclude it. Thus, while we are respectful of Mexico's sovereignty, we find that in the present case it does not weigh heavily against the reasonableness of jurisdiction.

D. Interests of Forum State.

California has strong interests in protecting its residents from injury and in furnishing a forum where their injuries may be remedied. *Raffaele*, 707 F.2d at 398. It has a special interest in exercising jurisdiction over those who have committed tortious acts within its boundaries. By subjecting the tortfeasor to liability for damages which are the proximate result of the tort, California acts to deter wrongful conduct affecting those within the state. *Data Disc*, 557 F.2d at 1288.

In addition, California also has an interest in ensuring that its citizens are fully compensated for their injuries. Such an interest is important both to ensure that injured individuals

recover for their losses and to protect the state's economic resources from unnecessary expenditures. Finally, the forum state's interest in protecting the welfare of its minor residents is unquestionably important. *Kulko v. California Superior Court*, 436 U.S. 84, 98 (1978).

E. Most Efficient Resolution.

District court in San Diego would be the most efficient judicial forum. A court sitting in the district where the injury occurred and where the evidence is located ordinarily will be the most efficient forum. *Raffaele,* 707 F.2d at 399. As discussed above, San Diego will most likely be the richest source of physical evidence, witnesses and documents.

The district court is required to apply California's choice of law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941). If Mexican law should apply, that would admittedly have a negative effect on the efficiency of proceeding in the United States. *I.N.A.*, 649 F.2d at 1273. However, we cannot tell from the briefs or record whether a true conflict of law exists. Mexico has not shown how its law conflicts with relevant California law or why its law should be applied. In any event, we are confident that a court in California can be trusted to apply properly the law of a foreign state. Thus, choice of law considerations are not a major impediment to the efficient resolution of this dispute.

F. Convenient and Effective Relief for Plaintiffs.

Undoubtedly, a California court affords appellants the most convenient and effective site for judicial relief. Not only is important evidence present in the United States, but concerns for appellants' personal comfort and convenience argue in favor of a United States forum. As this court observed in *Raffaele*, "Individual claimants 'would be at a severe disadvantage if they were forced to follow the . . . [defendant] to a distant state in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof.' "

Raffaele, 707 F.2d at 399 (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)). Access to a California court is important to appellants for obtaining relief.

Finally, appellants' likelihood of enforcing a judgment against Mexico also bears on the effectiveness of a California court as a forum for resolving the dispute. *I.N.A.*, 649 F.2d at 1273. Mexico is not immune to jurisdiction and thus enforcement of a judgment is not barred. Mexico has not shown how a judgment against it is unenforceable and thus we cannot conclude that such enforcement is so unlikely as to weigh against the reasonableness of jurisdiction.

G. Availability of an Alternate Forum.

Appellants recognize that Mexico affords an alternative forum but argue that it is, for practical purposes, unavailable. While the practicality of the alternative forum must be considered, *see Hedrick*, 715 F.2d at 1359; *Raffaele*, 707 F.2d at 399, appellants must carry the burden of proving the unavailability of an alternative forum. *I.N.A.*, 649 F.2d at 1273. Appellants allude to a severe maximum limit on wrongful death recoveries, *see Hurtado v. Superior Court*, 11 Cal.3d 574, 578-79, 114 Cal. Rptr. 106, 108 (1974), but offer no proof of applicable Mexican law to substantiate their allegation. Because appellants fail to carry their burden of proof, we cannot conclude that they are left without an alternative forum.

After considering all the relevant factors, we conclude that, on balance, it would be reasonable for a California court to exercise jurisdiction over Mexico and thus, personal jurisdiction is consistent with due process requirements.

REVERSED AND REMANDED.

Memorandum Decision and Order of the United States District Court for the Southern District of California, dated January 17, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 81-1067-JLI(H)

URSULA BAINES SANCHEZ, by and through her Guardians ad Litem JOSEPH J. CERNIE and SALLY Z. CERNIE,

Plaintiffs,

—vs.—

THE REPUBLIC OF MEXICO, a Foreign Government, ESTATE OF RENE HERNANDEZ RODRIGUEZ, BEECH AIRCRAFT, a Kansas corporation,

Defendants.

Civil No. 82-0413-JLI(M)

ERIN RAYNE OLSEN, a Minor by PATTY SHELDON, Maternal Grandmother and Guardian ad Litem,

Plaintiffs,

—vs.—

GOVERNMENT OF MEXICO, ATTORNEY GENERAL OF MEXICO, UNITED STATES OF AMERICA, FEDERAL AVIATION ADMINISTRATION OF THE UNITED STATES OF AMERICA, et al.,

Defendants.

MEMORANDUM DECISION AND ORDER

The Goverment of Mexico, appearing specially, brings these two motions to dismiss contending: 1) that the District Court lacks personal jurisdiction over the Government of Mexico; 2) that the sovereign immunity provision of 28 U.S.C. § 1605(a) bar this action; and 3) that the action should be dismissed on the basis of *forum non conveniens*. Since this court finds there is no personal jurisdiction the latter two issues need not be discussed, and accordingly, the Government of Mexico is dismissed as a defendant in these two cases.

The relevant facts are as follows: Pursuant to a treaty for the transfer of prisoners between the United States and Mexico, the Government of Mexico arranged a flight from Yucatan to Tijuana, Baja California, where several prisoners were to be exchanged. Enroute to Tijuana, weather conditions made it necessary that the plane, owned and piloted by the Government of Mexico, enter United States airspace. In its approach to the Tijuana airport, the plane crashed some 1300 yards North of the United States/Mexico border. All on board were killed, and the plaintiffs in these cases are heirs of two of the deceased passengers who were U.S. citizen prisoners to be exchanged.

DISCUSSION

In determining whether a federal court has the power to exercise personal jurisdiction over a defendant, two independent considerations need be made: 1) whether an applicable statute potentially confers personal jurisdiction over the defendant; and 2) whether such an assertion comports with the due process requirements of the United States Constitution. *Data Disc, Inc. vs. Systems Tech Assoc., Inc.*, 557 F.2d 1280, 1286 (9th Cir. 1977). The Foreign Sovereign Immunities Act, 28 U.S.C. 1602, *et. seq.* (FSIA) clearly satisfies the first requirement, *see Meadows vs. Dominican Republic*, 542 F. Supp. 33, 34 (N.D. Cal 1982) and therefore, our concern here is with the due process limitations of the Constitution.

There is no due process violation if the defendant "has certain minimum contacts with (the forum state) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe vs. Washington*, 326 U.S. 310, 316 (1945). As discussed in *Data Disc, supra*, if the non-resident defendant's activities within a state are neither "substantial" nor "continuous and systematic," jurisdiction depends on the nature and quality of those of the defendant's contacts that are related to the cause of action. *Insurance Company of North America vs. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981).

General Jurisdiction

In determining whether there is general jurisdiction, this court must determine whether the contacts in this case are "substantial" or "continuous and systematic."

In *Meadows vs. Dominican Republic*, 542 F.Supp. 33, 34 (N.D. Cal 1982) the court held that the contacts to be analyzed are only those with the state and not the United States. This court feels the *Meadows* decision is persuasive, and thus contacts with the United States are immaterial; state contacts alone need be considered.

The plaintiffs have not shown, to the satisfaction of this court, that there are sufficient contacts, of either a "systematic and continuous" or "substantial" nature so as to allow general personal jurisdiction in this case.

Further, the legislative history of the FSIA indicates that each immunity provision requires "some connection between the lawsuit and the United States." Report of House Judiciary Committee Nos. 94-1487 reprinted in U.S. Code Cong. and Administrative News 6604, 6612. This language would indicate the contemplation of a case by case minimum contacts analysis, almost foregoing the possibility of general personal jurisdiction in cases under the FSIA.

Because of the failure of proof, or alternatively the intent of Congress, this court finds no general personal jurisdiction over the defendant in this case.

Minimum Contacts Analysis

In evaluating the contacts, the Ninth Circuit has required the following three elements: 1) the defendant must purposefully avail itself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum laws; 2) the claim must arise or result from the defendant's forum-related activities; and 3) the exercise of jurisdiction must be reasonable. *Data Disc, supra*, 557 F.2d at 1207.

As the court did in *INA*, this court need not decide the first and second considerations.

This court, in reviewing the entire record and supporting documentation, believes that a weighing of the factors enumerated in *INA*, 649 F.2d at 1270, plus other relevant facts brought forth in the pleadings and oral argument, require a conclusion that it would be unreasonable to find jurisdiction over Mexico in this case. The factors enumerated in *INA*, and this court's findings as to those factors, are as follows:

(A) The extent of the purposeful interjection into the forum state. In *INA*, the court stated: "the slightness of the purposeful interjection militates against the reasonableness of jurisdiction." *Id.* at 1271. In this case, the degree of purposeful interjection is especially minimal. Not only was the flight for the specific purpose of carrying out the mandate of the prisoner exchange treaty, all the events were done under the express constraints of the letter of agreement describing procedures for the use and coordination of airspace around the United States/Mexico border. Specifically, only certain meteorological conditions allowed the use of such airspace, and the coordination of such use was highly limited. *See* letter of agreement, effective date April 1, 1979, paragraph 4(b)(2), attached as Exhibit "D" to plaintiff, Sanchez' opposition.

Thus, the smallness of purposeful interjection reduces the anticipation and reasonableness of jurisdiction, and this factor weighs against personal jurisdiction being asserted in this case.

(B) The burden on the defendant of defending in the forum. The primary concern in balancing the burdens on the parties is,

of course, for the defendant. *INA, supra*, 649 F.2d at 1272. In this case, many of the causative factors are alleged to have occurred in Mexico, far from this forum. The origin of the plane, the training of the pilot, and the maintenance of the aircraft all took place in the interior of Mexico. While any pilot error or negligence could have occurred in the United States, the burden on the defendant in asserting its position as to the other allegations is great, and "the burdens on a defendant are of particular significance if, as here, the defendant has done little to reach out to the forum state." *Id.*

(C) The extent of conflict with the sovereignty of the defendant's state. *INA* noted that the sovereign status of a defendant militates against the reasonableness of jurisdiction, but did not relate a holding as to the effect of the FSIA. *Id.* The issue, then, becomes whether the FSIA gives such clear notice as to remove the expectations of immunity, thereby precluding this as a reasonableness factor. Although this court need not decide whether Mexico is immune from suit in this case, it does find that the immunity issue is very close. Therefore, there was no clear notice to Mexico of the removal of the expectations of immunity so as to weigh in favor of the reasonableness of personal jurisdiction. Thus, this factor certainly bears negatively on the reasonableness of personal jurisdiction.

(D) The forum's interest in adjudicating the dispute. Although there was some question at oral argument as to this, on balance, this factor probably weighs in favor of reasonableness in asserting personal jurisdiction.

(E) The most efficient resolution of the controversy. Because of the location of proof, much of which presumably is in Mexico, and problems of enforcing a judgment of this court, *see INA*, 649 F.2d at 1273, this factor, too, weighs against a finding of reasonableness.

(F) The importance of the forum to plaintiff's interest in convenient and effective relief. Again, the problem of enforcing judgments, and as noted below, the availablility of an alternative forum, weigh against the reasonableness of personal jurisdiction in this case.

(G) The existence of an alternative forum. Plaintiff must carry the burden of going forward on this issue, *Id.* at 1273, and offered no proof that an alternative forum does not exist. Further, the Government of Mexico has argued the existence of such an alternative forum. Therefore, this court need not reach the question whether the non-existence of a Mexican forum would affect the reasonableness of jurisdiction in this court.

A balancing of these factors compels this court to find that personal jurisdiction would be unreasonable if asserted against the Government of Mexico in this case, and therefore violative of due process. Therefore, the defendant, Government of Mexico, is hereby dismissed as a defendant in these two actions.

IT IS SO ORDERED.

DATED: January 17, 1983.

/s/ J. LAWRENCE IRVING

J. Lawrence Irving, *Judge*
United States District Court

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Order and Judgment of the United States District Court for the Southern District of California, dated June 22, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 82-0413-JLI (M)

ERIN RAYNE OLSEN, a Minor by PATTY SHELDON, Maternal Grandmother and Guardian ad Litem,

Plaintiffs,

vs.

GOVERNMENT OF MEXICO, ATTORNEY GENERAL OF MEXICO, etc., et al.,

Defendants.

Case No. 81-1067-JLI (H)

URSULA BAINES SANCHEZ, by and through her Guardians ad Litem, JOSEPH J. CERNIE and SALLY Z. CERNIE,

Plaintiffs,

vs.

THE REPUBLIC OF MEXICO, a Foreign Government, etc., et al.,

Defendants.

ORDER OF DISMISSAL

The motion of Plaintiff OLSEN for express determination and order pursuant to Federal Rules of Civil Procedure, Rule 54(b), which motion was joined in by Plaintiff SANCHEZ, was heard by the court, the Honorable J. Lawrence Irving, Judge presiding, on June 20, 1983. Said motion was not opposed by Defendant REPUBLIC OF MEXICO or Defendant UNITED STATES OF AMERICA. Said motion references the court's prior ruling which granted Defendant REPUBLIC OF MEXICO's motion to dismiss as to said defendant REPUBLIC OF MEXICO entered January 17, 1983. After consideration of the issues and authorities, the court rules as follows:

IT IS HEREBY DETERMINED AND ORDERED:

1. That a judgment of dismissal of Defendant REPUBLIC OF MEXICO be entered nunc pro tunc as of the date of the ruling granting Defendant REPUBLIC OF MEXICO's motion to dismiss in these cases;

2. That said judgment of dismissal is expressly made pursuant to Federal Rules of Civil Procedure, Rule 54(b); and

3. That there is no just reason for delay in directing the entry of such final judgment.

DATED: June 22, 1983

J. LAWRENCE IRVING
United States District Court Judge

Order Extending Time to File Petition for Writ of Certiorari, dated June 14, 1984

SUPREME COURT OF THE UNITED STATES

No. A-1012

UNITED MEXICAN STATES,

Petitioner,

—v.—

ERIN RAYNE OLSEN, ETC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 27, 1984.

/s/ WILLIAM H. REHNQUIST

Associate Justice of the Supreme Court of the United States

Dated this 14th
day of June, 1984.

United States Constitution, Amendment V

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States–Mexico

MEXICO

Prisoner Transfer

Treaty signed at México November 25, 1976;
Ratification advised by the Senate of the United States of America, subject to a declaration,[1] *July 21, 1977;*
Ratified by the President of the United States of America August 2, 1977;
Ratified by México October 24, 1977;
Ratifications exchanged at Washington October 31, 1977;
Proclaimed by the President of the United States of America November 12, 1977;
Entered into force November 30, 1977.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Treaty between the United States of America and the United Mexican States on the Execution of Penal Sentences was signed at Mexico City on November 25, 1976, the text of which Treaty, in the English and Spanish languages, is hereto annexed;

The Senate of the United States of America by its resolution of July 21, 1977, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Treaty;

The Treaty was ratified by the President of the United States of America on August 2, 1977, in pursuance of the advice and

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1 The declaration reads: "That the United States Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in article IV has been enacted."

consent of the Senate, and was duly ratified on the part of the United Mexican States;

It is provided in Article X of the Treaty that the Treaty shall enter into force thirty days after the exchange of instruments of ratification;

The instruments of ratification of the Treaty were exchanged at Washington on October 31, 1977; and accordingly the Treaty will enter into force on November 30, 1977;

NOW, THEREFORE, I, Jimmy Carter, President of the United States of America, proclaim and make public the Treaty, to the end that it shall be observed and fulfilled with good faith on and after November 30, 1977, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twelfth day of November in the year of our Lord one thousand nine hundred seventy-seven and of the Independence of the United States of America the two hundred second.

JIMMY CARTER

By the President:
CYRUS VANCE
Secretary of State

[SEAL]

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES ON THE EXECUTION OF PENAL SENTENCES

The United States of America and the United Mexican States, desiring to render mutual assistance in combating crime insofar as the effects of such crime extend beyond their borders and to provide better administration of justice by adopting methods furthering the offender's social rehabilitation, have resolved to conclude a Treaty on the execution of penal sentences and, to that end, have named their plenipotentiaries Joseph John Jova, Ambassador Extraordinary and Plenipotentiary by the President of the United States of America and Alfonso Garcia Robles, Secretary of Foreign Relations by the President of the United Mexican States,

Who, having exchanged their full powers and having found them in proper and due form, have agreed on the following Articles:

Article I

(1) Sentences imposed in the United Mexican States on nationals of the United States of America may be served in penal institutions or subject to the supervision of the authorities of the United States of America in accordance with the provisions of this Treaty.

(2) Sentences imposed in the United States of America on nationals of the United Mexican States may be served in penal institutions or subject to the supervision of the authorities of the United Mexican States in accordance with the provisions of this Treaty.

Article II

This Treaty shall apply only subject to the following conditions:

(1) That the offense for which the offender was convicted and sentenced is one which would also be generally punishable as a crime in the Receiving State, provided, however, that this condition shall not be interpreted so as to require that the crimes described in the laws of the two States be identical in such matters not affecting the character of the crimes such as the quantity of property or money taken or possessed or the presence of interstate commerce.

(2) That the offender must be a national of the Receiving State.

(3) That the offender not be a domiciliary of the Transferring State.

(4) That the offense not be a political offense within the meaning of the Treaty of Extradition of 1899 [1] between the parties, nor an offense under the immigration or the purely military laws of a party.

(5) That at least six months of the offender's sentence remains to be served at the time of petition; and

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1 TS 242; 31 Stat. 1818.

(6) That no proceeding by way of appeal or of collateral attack upon the offender's conviction or sentence be pending in the Transferring State and that the prescribed time for appeal of the offender's conviction or sentence has expired.

Article III

Each State shall designate an authority to perform the functions provided in this Treaty.

Article IV

(1) Every transfer under the Treaty shall be commenced by the Authority of the Transferring State. Nothing in this Treaty shall prevent an offender from submitting a request to the Transferring State for consideration of his transfer.

(2) If the Authority of the Transferring State finds the transfer of an offender appropriate, and if the offender gives his express consent for his transfer, said Authority shall transmit a request for transfer, through diplomatic channels, to the authority of the Receiving State.

(3) If the Authority of the Receiving State approves the request, it shall promptly so inform the Transferring State and shall initiate the necessary procedures to effect the transfer of the offender. If it does not approve the request, it shall so notify promptly the Authority of the Transferring State.

(4) In deciding upon the transfer of an offender the Authority of each Party shall bear in mind all factors bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender, including the nature and severity of his offense and his previous criminal record, if any, his medical condition, the strength of his connections by residence, presence in the territory, family relations and otherwise to the social life of the Transferring State and the Receiving State.

(5) If the offender was sentenced by the courts of a state of one of the Parties, the approval of the authorities of that state, as well as that of the Federal Authority, shall be required. The Federal Authority of the Receiving State shall, however, be responsible for the custody of the transferred offender.

(6) No offender shall be transferred unless either the sentence which he is serving has a specified duration, or such a duration has subsequently been fixed by the appropriate administrative authorities.

(7) The Transfering State shall furnish the Receiving State a statement showing the offense of which the offender was convicted, the duration of the sentence, the length of time already served by the prisoner and any credits to which the offender is entitled, such as, but not limited to, work done, good behavior or pretrial confinement. Such statement shall be translated into the language of the Receiving State and duly authenticated. The Transferring State shall also furnish the Receiving State a certified copy of the sentence handed down by the competent judicial authority and any modifications thereof. It shall also furnish additional information that might be useful to the Authority of the Receiving State in determining the treatment of the convict with a view to his social rehabilitation.

(8) If the Receiving State considers that the documents supplied by the Transferring State do not enable it to implement this Treaty, it may request additional information.

(9) Each Party shall take the necessary legislative measures and, where required, shall establish adequate procedures, to give for purposes of this Treaty, legal effect, within its territory to sentences pronounced by courts of the other party.

Article V

(1) Delivery of the offender by the authorities of the Transferring State to those of the Receiving State shall occur at a place agreed upon by both parties. The Transferring State shall

afford an opportunity to the Receiving State, if it so desires, to verify, prior to the transfer, that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof, through the officer designated by the laws of the Receiving State.

(2) Except as otherwise provided in this Treaty, the completion of a transferred offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise. The Transferring State shall, however, retain the power to pardon or grant amnesty to the offender and the Receiving State shall, upon being advised of such pardon or amnesty release the offender.

(3) No sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the date at which it would have terminated according to the sentence of the court of the Transferring State.

(4) The Receiving State shall not be entitled to any reimbursement for the expenses incurred by it in the completion of the offender's sentence.

(5) The Authorities of each Party shall, every six months, exchange reports indicating the status of confinement of all offenders transferred under this Treaty, including in particular the parole or release of any offender. Either Party may, at any time, request a special report on the status of the execution of an individual sentence.

(6) The fact that an offender has been transferred under the provisions of this Treaty shall not prejudice his civil rights in the Receiving State in any way beyond those ways in which the fact of his conviction in the Transferring State by itself effects such prejudice under the laws of the Receiving State or any State thereof.

Article VI

The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts. The Receiving State shall, upon being advised by the Transferring State of action affecting the sentence, take the appropriate action in accordance with such advice.

Article VII

An offender delivered for execution of a sentence under this Treaty may not be detained, tried or sentenced in the Receiving State for the same offense upon which the sentence to be executed is based. For purposes of this Article, the Receiving State will not prosecute for any offense the prosecution of which would have been barred under the law of that State, if the sentence had been imposed by one of its courts, federal or state.

Article VIII

(1) This Treaty may also be applicable to persons subject to supervision or other measures under the laws of one of the Parties relating to youthful offenders. The Parties shall, in accordance with their laws, agree to the type of treatment to be accorded such individuals upon transfer. Consent for the transfer shall be obtained from the legally authorized person.

(2) By special agreement between the Parties, persons accused of an offense but determined to be of unsound mental condition may be transferred for care in institutions in the country of nationality.

(3) Nothing in this Treaty shall be interpreted to limit the ability which the Parties may have, independent of the present Treaty, to grant or accept the transfer of youthful or other offenders.

Article IX

For the purposes of this Treaty,—

(1) "Transferring State" means the party from which the offender is to be transferred.

(2) "Receiving State" means the party to which the offender is to be transferred; and

(3) "Offender" means a person who, in the territory of one of the parties, has been convicted of a crime and sentenced either to imprisonment or to a term of probation, parole, suspended sentence, or any other form of supervision or conditional sentence without confinement.

(4) A "domiciliary" means a person who has been present in the territory of one of the parties for at least five years with an intent to remain permanently therein.

Article X

(1) This treaty is subject to ratification. The exchange of ratifications shall take place in Washington.

(2) This Treaty shall enter into force thirty days after the exchange of ratifications and shall remain in force for three years.[1]

(3) Should neither contracting Party have notified the other ninety days before the three-year period mentioned in the preceding paragraph has expired of its intention to let the Treaty terminate, the Treaty shall remain in force for another three years, and so on every three years.

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1 Nov. 30, 1977.

DONE at Mexico City in duplicate, this twenty-fifth day of November, one thousand nine hundred seventy-six, in the English and Spanish languages, each text of which shall be equally authentic.

FOR THE UNITED STATES OF AMERICA:

/s/ JOSEPH JOHN JOVA[1]

FOR THE UNITED MEXICAN STATES:

/s/ ALFONSO GARCIA ROBLES[2]

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1 Joseph John Jova

2 Alfonso Garcia Robles

TRATADO ENTRE LOS ESTADOS UNIDOS DE AMERICA Y LOS ESTADOS UNIDOS MEXICANOS SOBRE LA EJECUCION DE SENTENCIAS PENALES

Los Estados Unidos de América y los Estados Unidos Mexicanos, animados por el deseo de prestarse mutuamente asistencia en la lucha contra la criminalidad en la medida en que los efectos de esta trascienden sus fronteras y de proveer a una mejor administración de la justicia mediante la adopción de métodos que faciliten la rehabilitación social del reo, han resuelto concluir un Tratado sobre la Ejecución de Sentencias Penales y, con tal fin, han nombrado sus plenipotenciarios:

El Presidente de los Estados Unidos de América, al señor Joseph John Jova, Embajador Extraordinario y Plenipotenciario de los Estados Unidos de América en México y

El Presidente de los Estados Unidos Mexicanos, al señor licenciado Alfonso García Robles, Secretario de Relaciones Exteriores quienes, después de haberse comunicado sus plenos poderes y haberlos encontrado en buena y debida forma, han convenido en los Artículos siguientes:

ARTICULO I

1. Las penas impuestas en los Estados Unidos Mexicanos a nacionales de los Estados Unidos de América podrán ser extinguidas en establecimientos penales de los Estados Unidos de América o bajo la vigilancia de sus autoridades, de conformidad con las disposiciones del presente Tratado.

2. Las penas impuestas en los Estados Unidos de América a nacionales de los Estados Unidos Mexicanos podrán ser extinguidas en establecimientos penales de los Estados Unidos Mexicanos o bajo la vigilancia de sus autoridades, de conformidad con las disposiciones del presente Tratado.

ARTICULO II

El presente Tratado se aplicará únicamente bajo las siguientes condiciones:

1) Que el delito por el cual el reo fue declarado culpable y sentenciado sea también generalmente punible en el Estado Receptor, en la inteligencia que, sin embargo, esta condición no será interpretada en el sentido de requerir que los delitos tipificados en las leyes de ambos estados sean idénticos en aquellos aspectos que no afectan a la índole del delito como, por ejemplo, la cantidad de los bienes o del numerario sustraido o en posesión del reo, o la presencia de factores relativos al comercio interestatal.

2) Que el reo sea nacional del Estado Receptor.

3) Que el reo no esté domiciliado en el Estado Trasladante.

4) Que el delito no sea político en el sentido del Tratado de Extradición de 1899 entre las Partes, ni tampoco un delito previsto en las leyes de migración o las leyes puramente militares.

5) Que la parte de la sentencia del reo que quede por cumplirse en el momento de la solicitud sea de por lo menos seis meses.

6) Que ningún procedimiento de apelación, recurso o juicio en contra de la sentencia o de la pena esté pendiente de resolución en el Estado Trasladante y que el término prescrito para la apelación de la condena del reo haya vencido.

ARTICULO III

Cada Estado designará una autoridad que se encargará de ejercer las funciones previstas en el presente Tratado.

ARTICULO IV

1) Todo traslado conforme al presente Tratado se iniciará por la Autoridad del Estado Trasladante. Nada de lo dispuesto en el presente Tratado impedirá a un reo presentar una solicitud al Estado Trasladante para que considere su traslado.

2) Si la Autoridad del Estado Trasladante considera procedente el traslado de un reo y si éste da su consentimiento

expreso para su traslado, dicha Autoridad transmitirá una solicitud en ese sentido, por los conductos diplomáticos, a la Autoridad del Estado Receptor.

3) Si la Autoridad del Estado Receptor acepta la solicitud, lo comunicará sin demora al Estado Trasladante e iniciará los procedimientos necesarios para efectuar el traslado del reo. Si no la acepta, lo hará saber sin demora a la Autoridad del Estado Trasladante.

4) Al decidir respecto del traslado de un reo, la Autoridad de cada una de las Partes tendrá en cuenta todos los factores pertinentes a la probabilidad de que el traslado contribuya a la rehabilitación social del reo, incluyendo la índole y gravedad del delito y los antecedentes penales del reo, si los tuviere; las condiciones de su salud; los vínculos que, por residencia, presencia en el territorio, relaciones familiares u otros motivos, pueda tener con la vida social del Estado Trasladante y del Estado Receptor.

5) Si el reo fue sentenciado por los tribunales de un Estado de una de las Partes, será necesario tanto la aprobación de las autoridades de dicho Estado, como la de la Autoridad Federal. No obstante, la Autoridad Federal del Estado Receptor será responsable de la custodia del reo.

6) No se llevará a cabo el traslado de reo alguno a menos que la pena que esté cumpliendo tenga una duración determinada o que las autoridades administrativas competentes hayan fijado posteriormente su duración.

7) El Estado Trasladante proporcionará al Estado Receptor una certificación que indique el delito por el cual fue sentenciado el reo, la duración de la pena, el tiempo ya cumplido por el reo y el tiempo que deba abonársele por motivos tales como, entre otros, trabajo, buena conducta o prisión preventiva. Dicha certificación será traducida al idioma del Estado Receptor y debidamente legalizada. El Estado Trasladante también proporcionará al Estado Receptor una copia certificada de la sentencia dictada por la Autoridad Judicial competente y de

cualesquiera modificaciones que haya tenido. El Estado Trasladante también proporcionará toda información adicional que pueda ser útil a la Autoridad del Estado Receptor para determinar el tratamiento del reo con vistas a su rehabilitación social.

8) Si el Estado Receptor considera que los informes proporcionados por el Estado Trasladante no son suficientes para permitirle la aplicación del presente Tratado, podrá solicitar información complementaria.

9) Cada una de las Partes tomará las medidas legislativas necesarias y, en su caso, establecerá los procedimientos adecuados, para que, para los fines del presente Tratado, surtan efectos legales en su territorio las sentencias dictadas por los tribunales de la otra Parte.

ARTICULO V

1) La entrega del reo por las autoridades del Estado Trasladante a las del Estado Receptor se efectuará en el lugar en que convengan ambas Partes. Antes del traslado, el Estado Trasladante dará al Estado Receptor la oportunidad, si éste la solicita, de verificar, por conducto del funcionario competente conforme a las leyes del Estado Receptor, que el consentimiento del reo para su traslado fue otorgado voluntariamente y con pleno conocimiento de las consecuencias inherentes.

2) Salvo disposición en contrario del presente Tratado, el cumplimiento de la sentencia de un reo trasladado se sujetará a las leyes y procedimientos del Estado Receptor, incluyendo la aplicación de toda disposición relativa a la condena condicional y a la reducción del período de prisión mediante libertad preparatoria o cualquier otra forma de preliberación. El Estado Trasladante conservará, sin embargo, la facultad de indultar al reo o concederle amnistía y el Estado Receptor, al recibir aviso de tal indulto o amnistía, pondrá al reo en libertad.

3) Ninguna sentencia de prisión será ejecutada por el Estado Receptor de manera a prolongar la duración de la pena más

allá de la fecha en que quedaría extinguida de acuerdo con la sentencia del tribunal del Estado Trasladante.

4) El Estado Receptor no podrá reclamar el reembolso de los gastos en que incurra con motivo de la ejecución de la sentencia del reo.

5) Las Autoridades de las Partes intercambiarán, cada seis meses, informes sobre el estado que guarde la ejecución de las sentencias de todos los reos trasladados conforme al presente Tratado, incluyendo en particular los relativos a la excarcelación (libertad preparatoria o libertad absoluta) de cualquier reo. Cualquiera de las Partes podra solicitar, en cualquier momento, un informe especial sobre el estado que guarde la ejecución de una sentencia individual.

6) El hecho de que un reo haya sido trasladado conforme a las disposiciones del presente Tratado no afectará sus derechos civiles en el Estado Receptor más allá de lo que pueda afectarlos, conforme a las leyes del Estado Receptor o de cualquiera de sus entidades federativas, el hecho mismo de haber sido objeto de una condena en el Estado Trasladante.

ARTICULO VI

El Estado Trasladante tendrá jurisdicción exclusiva respecto de todo procedimiento, cualquiera que sea su índole, que tenga por objeto impugnar, modificar o dejar sin efectos las sentencias dictadas por sus tribunales. El Estado Receptor, al recibir aviso del Estado Trasladante de cualquier decisión que afecte a una sentencia, deberá adoptar las medidas que correspondan, conforme a dicho aviso.

ARTICULO VII

Un reo entregado para la ejecución de una sentencia conforme al presente Tratado no podrá ser detenido, procesado ni sentenciado en el Estado Receptor por el mismo delito que motivó la sentencia a ser ejecutada. Para los fines de este Artículo, el Estado Receptor no ejercitará acción penal en contra del reo por cualquier delito respecto del cual el ejercicio

de la acción penal no sería posible conforme a las leyes de ese Estado, en el caso de que la sentencia hubiere sido impuesta por uno de sus tribunales, federal o estatal.

ARTICULO VIII

1) El presente Tratado podrá también aplicarse a personas sujetas a supervisión u otras medidas conforme a las leyes de una de las Partes relacionadas con menores infractores. Las Partes, de conformidad con sus leyes, acordarán el tipo de tratamiento que se aplicará a tales personas una vez trasladadas. Para el traslado se obtendrá el consentimiento de quien esté legalmente facultado para otorgarlo.

2) Por acuerdo especial entre las Partes, las personas acusadas de un delito, respecto de las cuales se haya comprobado que sufren una enfermedad o anomalía mental podrán ser trasladadas para ser atendidas en instituciones en el país de su nacionalidad.

3) Ninguna disposición de este Tratado se interpretará en el sentido de limitar la facultad que las Partes puedan tener, independientemente del presente Tratado, para conceder o aceptar el traslado de un menor infractor u otra clase de infractor.

ARTICULO IX

Para los fines del presente Tratado:

1) "Estado Trasladante" significa la Parte de la cual el reo habrá de ser trasladado.

2) "Estado Receptor" significa la Parte a la que el reo habrá de ser trasladado.

3) "Reo" significa una persona que, en el territorio de una de las Partes ha sido declarada responsable de un delito y se encuentra sujeta, en virtud de una sentencia o de cualquier medida legal adoptada en ejecución de dicha sentencia, ya sea a prisión ya sea al régimen de condena condicional, de libertad preparatoria o de cualquier otra forma de libertad sujeta a vigilancia.

4) Un "domiciliado" significa una persona que ha radicado en el territorio de una de las Partes por lo menos cinco años con el propósito de permanecer en él.

ARTICULO X

1) El presente Tratado estará sujeto a ratificación. El Canje de ratificaciones tendrá lugar en Washington.

2) El presente Tratado entrará en vigor treinta días después del canje de ratificaciones y tendrá una duración de tres años.

3) Si ninguna de las Partes Contratantes hubiere notificado a la otra noventa días antes de la expiración del período de tres años a que se refiere el Apartado anterior, su intención de dejar que el Tratado termine, éste continuará en vigor por otros tres años y asi sucesivamente de tres en tres años.

Hecho en la Ciudad de México, en duplicado, a los veinticinco días del mes de noviembre del año mil novecientos setenta y seis, en los idiomas ingles y español, siendo cada uno de los textos igualmente auténticos.

Por los Estados Unidos de América:

/s/ JOSEPH JOHN JOVA

Por los Estados Unidos Mexicanos:

/s/ ALFONSO GARCIA ROBLES

Foreign Sovereign Immunities Act of 1976

CHAPTER 97.

JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Section
1602. Findings and declaration of purpose
1603. Definitions
1604. Immunity of a foreign state from jurisdiction
1605. General exceptions to the jurisdictional immunity of a foreign state
1606. Extent of liability
1607. Counterclaims
1608. Service; time to answer; default
1609. Immunity from attachment and execution of property of a foreign state
1610. Exceptions to the immunity from attachment or execution
1611. Certain types of property immune from execution

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§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2892.)

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title [28 USCS § 1608], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title [28 USCS § 1332(c), (d)], nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 190 Stat. 2892.)

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter [28 USCS §§ 1605-1607].

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2892.)

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state:

Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title [28 USCS § 1608] is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2892.)

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter [28 USCS §§ 1605, 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2894.)

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter [28 USCS § 1605] had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2894.)

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2894.)

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter [28 USCS §§ 1610, 1611].

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2895.)

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter [28 USCS § 1603(a)], used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act [see effective date note to 28 USCS § 1602], if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for

purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act [see effective date note to 28 USCS § 1062], if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter [28 USCS § 1605(a)(2), (3), (5), (b)], regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter [28 USCS § 1608(e)].

(d) The property of a foreign state, as defined in section 1603(a) of this chapter [28 USCS § 1603(a)], used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(Added Oct. 21, 1976, P. L. 94-593, § 4(a), Stat. 2896.)

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter [28 USCS § 1610], the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act [22 USCS §§ 288 et seq.] shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter [28 USCS § 1610], the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any with-

drawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver, or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2897.)

Diplomatic Note No. 0275 From the Embassy of Mexico to the United States, dated May 24, 1984

La Embajada de México saluda muy atentamente al Departamento de Estado y se permite traer a su atención un problema qué se suscitó a partir de la aplicación del Tratado sobre la Ejecución de Sentencias Penales, celebrado entre los Estados Unidos Mexicanos y los Estados Unidos de América en 1976.

Durante uno de los traslados efectuados en complimiento de dicho Tratado, una aeronave que transportaba varios reos al lugar convenido según el mismo instrumento bilateral, la ciudad de Tijuana, se vió en la necesidad de intentar un aterrizaje por instrumentos, en virtud de las inclemencias del tiempo. Para efectuar dicho aterrizaje se necesitaba cruzar la frontera de México con los Estados Unidos a fin de aproximarse al aeropuerto de Tijuana desde el lado oeste. De conformidad con la Carta-Convenio entre la administración Federal de Aeronáutica de los Estados Unidos y la SENEAM de México, que se habia celebrado en previsión de este tipo de eventualidades, la aeronave se internó en espacio aéreo norteamericano, que provisionalmente se cedó al control de México. Durante una de las aproximaciones para aterrizar, la aeronave chocó con un poste de teléfonos y se estrelló a 1,300 yardas al norte de la frontera internacional, pereciendo todas las personas que en ella viajaban.

Los familiares (descendientes) de los reos norteamericanos que fallecieron en el accidente demandaron al Gobierno de México en los Estados Unidos ante el Juzgado Federal para el Distrito Sur de California. Aunque en esta primera instancia la promoción presentada por el Gobierno de México, en que solicitó se desechara la demanda en su contra por falta de competencia, fue resuelta favorablemente, el Tribunal de Apelaciones para el Noveno Circuito ha revocado recientamente dicho fallo, resolviendo que el Gobierno de México no goza de inmunidad jurisdiccional de acuerdo con lo dispuesto en la Ley de Inmunidades de Soberanía Extranjera de los Estados Unidos. Este fallo se encuentra publicado en 729 *Federal Reporter*

Second 641, y es motivo de alta preocupación para el Gobierno de México, por no apegarse a la citada Ley y a las disposiciones del derecho internacional en la materia sobre inmunidad soberana, pues pretende que el Estado soberano de México pudiera estar expuesto a ser demandado ante los tribunales norteamericanos por actos realizados en complimiento de sus obligaciones bajo un Tratado que, según lo dispone el Artículo 1 de la Convención de Viena sobre el Derecho de los Tratados, de 1969, está regido por el derecho internacional.

El Gobierno de México con la asistencia del despacho jurídico de Curtis, Mallet-Prevost, Colt & Mosle, de la ciudad de Nueva York, tiene la intención de iniciar el procedimiento del recurso de revisión (*writ of certiorari*) ante la Suprema Corte de Justicia de los Estados Unidos, mediante el cual se pedirá la revocación de este desafortunado fallo del Tribunal de Apelaciones para el Noveno Circuito. En relación a este recurso, el Gobierno de México solicita la asistencia del Departamento de Estado, para lo cual la Embajada estará en estrecho contacto con los funcionarios competentes de ese Departamento.

La Embajada de México aprovecha la oportunidad para renovar al Departamento de Estado las seguridades de su más atenta consideración.

Washington, D.C., a 24 de mayo de 1984.

Departamento de Estado
Washington, D. C.

TRANSLATION

[Complimentary Opening]

The Mexican Embassy wishes to call to the Attention of the State Department that a matter has arisen concerning the implementation of the Treaty on the Execution of Penal Sentences entered into between the United Mexican States and the United States of America in 1976.

During one such transfer carried out pursuant to the Treaty, a plane carrying certain prisoners to the place agreed according to the Bilateral Treaty, the City of Tijuana, was forced to make an instrument landing because of bad weather. Such a landing necessitated crossing the border with the United States in order to approach the Tijuana airport from the west. Pursuant to a Letter Agreement between the United States Federal Aviation Administration and the Mexican SENEAM, which had been entered into in contemplation of such an eventuality, the plane utilized airspace which was temporarily ceded to Mexican control. During a landing approach, the plane struck a telephone pole and crashed 1,300 yards north of the border between Mexico and the United States, killing all on board.

The relatives (children) of the United States citizen prisoners killed in the crash have sued the Government of Mexico in the United States District Court for the Southern District of California. While the Government of Mexico was successful in its motion to have the case dismissed for lack of jurisdiction at this level, the United States Court of Appeals for the Ninth Circuit has recently reversed, ruling that the Government of Mexico lacked immunity from suit by reason of the United States Foreign Sovereign Immunities Act. This decision is reported at 729 Federal Reporter Second 641 and is very troubling to the Government of Mexico, inasmuch as it does not follow the principles contained in said Law and the international law provisions on the subject of sovereign immunity. The decision holds that the Sovereign Nation of Mexico may be exposed to suit in the United States courts for actions taken in contemplation of treaty obligations which, according

to Art. 1 of the Vienna Convention on the Law of Treaties of 1969, are governed by international law.

The Government of Mexico with the assistance of the law firm of Curtis, Mallet-Prevost, Colt & Mosle of New York City has the intention to file petition for a writ of certiorari to the United States Supreme Court seeking reversal of this unfortunate decision of the Court of Appeals. In connection with that effort, the Government of Mexico requests the assistance of the Department of State, for which the Embassy will be in close contact with the appropriate officers of the State Department.

[Complimentary Close]